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LAW REPORTS

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Supreme Court of Judicature.

CASES DETERMINED IN THE

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AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

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A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Ailesbury (Marquis of) and Lord Iveagh, *In re*	345
Ames, *In re*. Ames *v.* Ames	479
——— *v.* Ames. *In re* Ames	479
Andrews, Hands *v.* *In re* Smith (C.A.)	1
Attorney-General *v.* Manchester (Corporation of)	87

B.

Baker, National Telephone Company *v.*	186
Bank of Brazil, *Ex parte*. *In re* English Bank of the River Plate	438
Banks, Catton *v.*	221
Barber *v.* Penley	447
Barclay *v.* Pearson	154
Bedingfeld and Herring's Contract, *In re*	332
Bennett *v.* Bennett. *In re* Fish (C.A.)	413
Bentinck *v.* London Joint Stock Bank	120
Bland's Case. *In re* Westmoreland Green and Blue Slate Company (C.A.)	612
Borough Commercial and Building Society, *In re*	242
Bowen, *In re*. Lloyd Phillips *v.* Davis	491
Brighton Marine Palace and Pier, Limited *v.* Woodhouse	486
Brown *v.* Brown. *In re* Brown's Estate	300
Brown's Estate, *In re*. Brown *v.* Brown	300
Buckinghamshire (Earl of), Hampden *v.* (C.A.)	531

C.

PAGE

Campbell, *In re.* Campbell *v.* Campbell – – – – 206
——— *v.* Campbell. *In re* Campbell – – – – 206
Catton *v.* Banks – – – 221
Cheston *v.* Wells – – – 151
Christie *v.* Taunton, Delmard, Lane & Company. *In re* Taunton, Delmard, Lane & Company – – – – 175
City and Suburban Permanent Building Society, Pepe *v.* – 311
Collingham *v.* Sloper. Foreign, American, and General Investments Trust Company *v.* Sloper – – – – 96
Conway and Colwyn Bay Joint Water Supply Board, Jones *v.* (C.A.) 603

D.

Daniells & Sons' Breweries, Paine & Co. *v.* *In re* Paine & Co.'s Trade-marks (C.A.) 567
Davies, Evans *v.* – – – 216
Davis, Lloyd Phillips *v.* *In re* Bowen – – – – 491
D'Hédouville, Hope *v.* – – 361
Dexter's Application, *In re.* *In re* Wills's Trade-marks – – 262
Dibb *v.* Walker – – – 429

E.

Edwards, Robson *v.* – – 146
English Bank of the River Plate, *In re.* *Ex parte* Bank of Brazil – – – – 438
Evans *v.* Davies – – – 216

F.

Farrington *v.* Forrester. *In re* Jones – – – – 461
Fenner *v.* Wilson – – – 656
Field, Nicholson *v.* – – – 511
Fish, *In re.* Bennett *v.* Bennett (C.A.) 413
Flint *v.* Howard – (C.A.) 54

PAGE

Foreign, American, and General Investments Trust Company *v.* Sloper. Collingham *v.* Sloper – – – – 96
Forrester, Farrington *v.* *In re* Jones – – – – 461
Frape, *In re.* *Ex parte* Perrett (C.A.) 284

G.

Goldsborough, Mort & Co., North Australian Territory Company *v.* – – – (C.A.) 381
Gullick, Wolmershausen *v.* – 514

H.

Hampden *v.* Buckinghamshire (Earl of) – – (C.A.) 531
Hands *v.* Andrews. *In re* Smith (C.A.) 1
———, Wallis *v.* – – – 75
Harrington (Earl of), Howitt *v.* 497
Herring and Bedingfeld's Contract, *In re* – – – – 332
Hollinrake *v.* Truswell – – 377
Holloway, Wilson *v.* *In re* Wilson – – – – 340
Hope *v.* d'Hédouville – – 361
Howard, Flint *v.* – (C.A.) 54
Howe (Earl), Willis *v.* (C.A.) 545
Howitt *v.* Harrington (Earl of) 497

I.

Iveagh (Lord) and Marquis of Ailesbury, *In re* – – – 345

J.

Jones, *In re.* Farrington *v.* Forrester – – – – 461
——— *v.* Conway and Colwyn Bay Joint Water Supply Board – – (C.A.) 603

L.

Lloyd Phillips *v.* Davis. *In re* Bowen – – – – 491
Lock *v.* Pearce – (C.A.) 271

PAGE

London and Provincial Bank, Powell *v.* - - (C.A.) 555
London Joint Stock Bank, Bentinck *v.* - - - - - 120
London Tramways Company, Rapier *v.* - - (C.A.) 588

M.

Manchester (Corporation of), Attorney-General *v.* - - 87
———, Withington Local Board of Health *v.* - - (C.A.) 19
Manchester, Middleton, and District Tramways Company, *In re* - - - - - 638
Mining Shares Investment Company, *In re* - - - 660

N.

National Telephone Company *v.* Baker - - - - 186
Nicholson *v.* Field - - - 511
North Australian Territory Company *v.* Goldsborough, Mort, and Company - (C.A.) 381

O.

Ocean Queen Steamship Company, *In re* - - - - 666

P.

Paine & Co. *v.* Daniells & Sons' Breweries. *In re* Paine & Co.'s Trade-marks (C.A.) 567
Paine & Co.'s Trade-marks, *In re.* Paine & Co. *v.* Daniells & Sons' Breweries - - (C.A.) 567
Pearce, Lock *v.* - (C.A.) 271
Pearson, Barclay *v.* - - - 154
Peck and School Board for London, *In re* - - - 315
Penley, Barber *v.* - - - 447
Pepe *v.* City and Suburban Permanent Building Society - 311
Perrett, *Ex parte. In re* Frape (C.A.) 284
Powell *v.* London and Provincial Bank - - - (C.A.) 555
Powell's Trade-mark, *In re* (C.A.) 388

R.

Rapier *v.* London Tramways Company - - (C.A.) 588
Read *v.* Wotton - - - 171
Robson *v.* Edwards - - - 146

S.

St. John Street Wesleyan Methodist Chapel, Chester, *In re* - 618
School Board for London and Peck, *In re* - - - - 315
Sloper, Collingham *v.* Foreign, American, and General Investments Trust Company *v.* Sloper - - - - 96
———, Foreign, American, and General Investments Trust Company *v.* Collingham *v.* Sloper - - - - 96
Smith, *In re.* Hands *v.* Andrews (C.A.) 1
Stevens *v.* Trevor-Garrick - 307

T.

Tarn, *In re* - - (C.A.) 280
Taunton, Delmard, Lane and Company, *In re.* Christie *v.* Taunton, Delmard, Lane and Company - - - - 175
———, Company, Christie *v.* *In re* Taunton, Delmard, Lane and Company - - - - 175
Thornley *v.* Thornley - - 229
Trevor-Garrick, Stevens *v.* - 307
Truswell, Hollinrake *v.* - - 377
Tucker, *In re.* Tucker *v.* Tucker 323
——— *v.* Tucker. *In re* Tucker 323

V.

Varieties, Limited, *In re* - - 235

W.

PAGE

Walker, Dibb *v.* - - - 429
Wallis *v.* Hands - - - 75
Wells, Cheston *v.* - - - 151
West *v.* Wythes. *In re* Wythes 369
Westmoreland Green and Blue Slate Company, *In re.* Bland's Case - - - (C.A.) 612
White, *In re.* White *v.* White (C.A.) 41
——— *v.* White. *In re* White (C.A.) 41
Willis *v.* Howe (Earl) (C.A.) 545
Wills's Trade-marks, *In re. In re* Dexter's Application - - 262
Wilson, *In re.* Wilson *v.* Holloway - - - - - 340
———, Fenner *v.* - - - 656
——— *v.* Holloway. *In re* Wilson - - - - - 340
Withington Local Board of Health *v.* Manchester (Corporation of) - (C.A.) 19
Wolmershausen *v.* Gullick - 514
Woodhouse, Brighton Marine Palace and Pier, Limited *v.* - 486
Wotton, Read *v.* - - - 171
Wythes, *In re.* West *v.* Wythes 369
———, West *v.* *In re* Wythes - - - - 369

TABLE OF CASES CITED.

A.

		PAGE
Adnam *v.* Sandwich (Earl of)	2 Q. B. D. 485	499
Alexander *v.* Mills	Law Rep. 6 Ch. 124	333
Allen *v.* Jarvis	Law Rep. 4 Ch. 616	418
——— *v.* Seckham	11 Ch. D. 790	148
Allison *v.* City and South London Railway Company	Times, February 24, 1892	196, 590
Ambler's Trusts, Re	32 Sol. J. 541; 59 L. T. (N.S.) 210	512
Ames, In re	25 Ch. D. 72	418
Anderton and Milner's Contract, In re	45 Ch. D. 476	273
Antrobus *v.* Davidson	3 Mer. 569	517
Apleton *v.* Baily	1 Brownl. 102	501
Apollinaris Company's Trade-marks, In re	[1891] 2 Ch. 186	266, 390
Appleton *v.* Doily	Yelv. 135; 1 Brownl. 102	501
Archbold *v.* Scully	9 H. L. C. 360	501
Aston *v.* Wood	Law Rep. 6 Eq. 419	42
Atkin's Trade-mark, In re	3 Rep. Pat. Cas. 164	572
Attorney-General *v.* Guise	2 Vern. 266	51
——— *v.* Kingston (Mayor of)	34 L. J. (Ch.) 481; 13 W. R. 888	91
——— *v.* Syderfin	1 Vern. 224; 7 Ves. 43, n.	47
Auld *v.* Glasgow Working Men's Building Society	12 App. Cas. 197	312
Averall *v.* Wade	Ll. & G. (temp. Sudg.) 252	73, 470
Ayerst *v.* Jenkins	Law Rep. 16 Eq. 275	160
Aylesford (Earl of) *v.* Poulett (Earl)	[1892] 2 Ch. 60	7

B.

Badham *v.* Mee	1 My. & K. 32	333
Baines *v.* Baker	Amb. 158	87
Baker *v.* Sutton	1 Keen, 224	43
Ballard *v.* Tomlinson	29 Ch. D. 115	192
Bank of England *v.* Vagliano Brothers	[1891] A. C. 107	440
Baring *v.* Abingdon	[1892] 2 Ch. 374	75
Barker, In re	7 Jur. (N.S.) 1061	351
Barkshire *v.* Grubb	18 Ch. D. 616	315
Barnes *v.* Racster	1 Y. & C. Ch. 401	54
Barry Railway Company, In re	4 Ch. D. 315	642
Bartholomew *v.* Freeman	3 C. P. D. 316	219
Bayley *v.* Great Western Railway Company	26 Ch. D. 434	315

		PAGE
Baylies *v.* Baylies	1 Coll. 537	373
Bechervaise *v.* Lewis	Law Rep. 7 C. P. 372	525
Belcher *v.* Williams	45 Ch. D. 510	221
Bellamy *v.* Wells	39 W. R. 150	449
Benjamin *v.* Storr	Law Rep. 9 C. P. 400	452
Bennet's Case	2 Str. 786	500
Bentley, In re	54 L. J. (Ch.) 782	373
Betterton's Case	Holt, 538	448
Binney *v.* Ince Hall Coal and Cannel Company	35 L. J. (Ch.) 363	179
Birch *v.* Sherratt	Law Rep. 2 Ch. 544	323
Birks *v.* Trippet	1 Wms. Saund. 32	300
Birmingham and Lichfield Junction Railway Company, In re	28 Ch. D. 652	642
Birmingham, Dudley, and District Banking Company *v.* Ross	38 Ch. D. 295	84
Birtle's Settled Estates, Re	11 W. R. 739	354
Bolding *v.* Lane	1 D. J. & S. 122	431
Bolton *v.* Bolton	11 Ch. D. 968	317
Bongiovanni *v.* Société Générale	54 L. T. (N.S.) 320	127
Booth *v.* Alcock	Law Rep. 8 Ch. 663	148
Bowes *v.* Hope Life Insurance and Guarantee Company, In re	11 H. L. C. 389	647
Boycott, In re	29 Ch. D. 571	297
Bradford Banking Company *v.* Briggs	12 App. Cas. 29	180
Braintree Local Board *v.* Boyton	48 J. P. 582	23
Brampton and Longtown Railway Company, In re	Law Rep. 10 Ch. 177	648
Bramwell *v.* Lacy	10 Ch. D. 691	21
Brattle-Square Church *v.* Grant	3 Gray, 142	494
Brighty *v.* Norton	32 L. J. (Q.B.) 38; 3 B. & S. 305	303
Brown *v.* Gellatly	Law Rep. 2 Ch. 751	365
Browning *v.* Morris	2 Cowp. 790	163
Bruce *v.* Ailesbury (Marquess of)	[1892] A. C. 356	349
Brunton's Claim	Law Rep. 19 Eq. 302	179
Bryant *v.* Reading	17 Q. B. D. 128	282
Budget *v.* Hulford	W. N. (1873) 175	47
Bugden *v.* Bignold	2 Y. & C. Ch. 377	61
Burnaby's Settled Estates, In re	42 Ch. D. 621	373

C.

Cable *v.* Marks	52 L. J. (Ch.) 107	378
Camden *v.* Anderson	1 Bos. & P. 272	163
Caminada *v.* Hulton	60 L. J. (M.C.) 116	159
Capp *v.* Lancaster	Cro. Eliz. 548	303
Cardigan *v.* Curzon-Howe	40 Ch. D. 338	334
——— *v.* ———	41 Ch. D. 375	533
Carlill *v.* Carbolic Smoke Ball Company	[1892] 2 Q. B. 484	160
Carter *v.* Ring	3 Camp. 459	302
——— *v.* Silber	[1892] 2 Ch. 278	467
Cary *v.* Abbot	7 Ves. 490	51
Cavendish *v.* Geaves	24 Beav. 163	179
Chamberlayne *v.* Brockett	Law Rep. 8 Ch. 206	493
Chambers *v.* Manchester and Milford Railway Company	5 B. & S. 588	647
Chappell *v.* North	[1891] 2 Q. B. 252	487

		PAGE
Chapple, In re	27 Ch. D. 584	418
Chasemore *v.* Richards	7 H. L. C. 349	196
Cheesman, In re	[1891] 2 Ch. 289	297
Chichester (Earl of) *v.* Hall	17 L. T. (O.S.) 121	498
Chinnery *v.* Evans	11 H. L. C. 115	432
Christ's Hospital *v.* Grainger	1 Mac. & G. 460	491
Cincinnati Inclined Plane Railway Company *v.* City and Suburban Telegraph Association	48 Ohio State Rep. 390	194
Clark *v.* Taylor	1 Drew. 642	48
Clark's Trust, In re	1 Ch. D. 497	44
Clarke *v.* Clark	Law Rep. 1 Ch. 16	195
Clavering *v.* Clavering	2 Vern. 473	473
Clayton *v.* Dilly	4 Taunt. 165	163
Clephane *v.* Edinburgh (Lord Provost of)	Law Rep. 1 H. L. (Sc.) 417	48
Clowes *v.* Dickenson	5 John (N. Y.) Ch. 235	470
Cobham *v.* Dalton	Law Rep. 10 Ch. 655	1
Cocks *v.* Manners	Law Rep. 12 Eq. 574	42
Coddington *v.* Jacksonville Railway Company	39 L. T. (N.S.) 12	218
Coe *v.* Clay	5 Bing. 440	79
Colchester Tramways Company, In re	[1892] 1 Ch. 309	642
Coleman *v.* Llewellin	34 Ch. D. 143	151
Collins *v.* Benning	12 Mod. 444	303
——— *v.* Blantern	1 Sm. L. C., 7th ed. p. 369	166
Colonial Bank *v.* Cady	15 App. Cas. 267	129
Commercial Bank of South Australia, In re	36 Ch. D. 522	440
Cooke *v.* Eshelby	12 App. Cas. 271	129
——— *v.* Forbes	Law Rep. 5 Eq. 166	194
Coope *v.* Cresswell	Law Rep. 2 Ch. 112	431
Cooper, In re	27 Ch. D. 565	333
Cork and Youghal Railway Company, In re	Law Rep. 4 Ch. 748	21, 648
Corporation of the Sons of the Clergy and Skinner, In re	[1893] 1 Ch. 178	626
——— *v.* Sutton	27 Beav. 651	618
Coutts *v.* Gorham	1 Moo. & M. 396	147
Craythorne *v.* Swinburne	14 Ves. 160	516
Creagh *v.* Blood	3 J. & Lat. 133	78
Crowder *v.* Tinkler	19 Ves. 617	91
Crowther *v.* Elgood	34 Ch. D. 691	13
Crump *v.* Lambert	Law Rep. 3 Eq. 409	198
Cruse *v.* Paine	Law Rep. 6 Eq. 641; 4 Ch. 441	525
Cumberland Telephone and Telegraph Company *v.* United Electric Railway	42 Federal Reporter, 273	195
Cunliffe, Brooks & Co. *v.* Blackburn and District Benefit Building Society	9 App. Cas. 857	648
Cupit *v.* Jackson	13 Price, 721	325

D.

Darby *v.* Darby	3 Drew. 495	342
Davies *v.* Humphreys	6 M. & W. 153	517
——— *v.* Second Chatham Permanent Benefit Building Society	61 L. T. (N.S.) 680	312
Davis *v.* Comitti	52 L. T. (N.S.) 539	378

		PAGE
Davison *v.* Fox	11 Q. B. D. 377	283
——— *v.* Gent	1 H. & N. 744	75
Deere, In re	Law Rep. 10 Ch. 658.	6
Denver Hotel Company, In re	[1893] 1 Ch. 495	248
Dering *v.* Winchelsea (Earl of)	1 Cox, 318; 2 Bos. & P. 270	516
Dickenson *v.* Teasdale	1 D. J. & S. 52	431
Diggle *v.* Higgs	2 Ex. D. 422	162
Dimes *v.* Scott	4 Russ. 195	364
Dodd *v.* Lydall	1 Hare, 333	184
Dodds *v.* Shepherd	1 Ex. D. 75	282
Doe *v.* Hellier	3 T. R. 162	500
—— *v.* Johnston	McCl. & Y. 141	79
Doré Gallery, In re	W. N. (1891) 98	238
Drury *v.* Macnamara	5 E. & B. 612	79
Dunn's Trade-mark, In re	41 Ch. D. 439; 15 App. Cas. 252	572
Dunnachie *v.* Young	10 Court Sess. Cas. (4th Series) 874	571

E.

Edye, In re	63 L. T. (N.S.) 762; 39 W. R. 198	5
Eisdell *v.* Hammersley	31 Beav. 255.	333
Eldridge *v.* Knott	1 Cowp. 214	498
Eltham *v.* Kingsman	1 B. & Al. 683	160
Ely (Dean of) *v.* Bliss	2 D. M. & G. 459	501
——— *v.* Cash	15 M. & W. 617	501
Eno *v.* Dunn	15 App. Cas. 252	265
Evans *v.* Hoare	[1892] 1 Q. B. 593	287
——— *v.* Manchester, Sheffield and Lincolnshire Railway Company	36 Ch. D. 626	192
Ewen *v.* Bannerman	2 Dow. & C. 74	42

F.

Farmer *v.* Russell	1 Bos. & P. 296	163
Fawsitt, In re	30 Ch. D. 231	273
Finnis to Forbes	24 Ch. D. 591	626
Fisk *v.* Attorney-General	Law Rep. 4 Eq. 521	48
Fleck, In re	37 Ch. D. 677	212
Fleet *v.* Metropolitan Asylums Board	1 Times L. R. 80; 2 Times L. R. 361	22, 90
Fleming *v.* Hislop	11 App. Cas. 686	198
Fletcher *v.* Bealey	28 Ch. D. 688	91
——— *v.* Rylands	Law Rep. 1 Ex. 265; 3 H. L. 330	186
Flint *v.* Barnard	22 Q. B. D. 90	517
Ford *v.* Foster	Law Rep. 7 Ch. 611	391, 571
Fordham *v.* Wallis	10 Hare, 217	431
Forsyth *v.* Bristowe	8 Ex. 716	429
Foster *v.* Pearson	1 C. M. & R. 849	128
——— *v.* Smith	1 Ph. 629	329
France *v.* Clark	26 Ch. D. 257	566
Frewen *v.* Philipps	11 C. B. (N.S.) 449	147

		PAGE
Frisby, In re	43 Ch. D. 106	431
Fuente's Trade-mark, In re	[1891] 2 Ch. 166; 8 Rep. Pat. Cas. 214	266

G.

Gas Light and Coke Company v. St. Mary Abbott's Kensington (Vestry of)	15 Q. B. D. 1.	192
Gatty v. Field	9 Q. B. 431	163
Gayford v. Moffatt	Law Rep. 4 Ch. 133	147
Geddis v. Bann Reservoir (Proprietors of the)	3 App. Cas. 430	192
General South American Company, In re	7 Ch. D. 637.	440
Gent, In re	40 Ch. D. 190	5
George, In re	44 Ch. D. 627	303
——— v. Clagett	7 T. R. 359	182
Gibson v. Seagrim	20 Beav. 614	72
Gifford, Ex parte	6 Ves. 805	523
Gill v. Lyon	1 John (N.Y.) Ch. 447	470
Gillard v. Cheshire Lines Committee	32 W. R. 943	75
Gillespie, In re	16 Q. B. D. 702; 18 Q. B. D. 286	440, 442
Gledhill v. Hunter	14 Ch. D. 492	173
Gloucester (Mayor of) v. Wood	3 Hare, 131; 1 H. L. C. 272	47
Gold Company, In re	11 Ch. D. 701	238
——————, In re	12 Ch. D. 77.	384
Goodfellow v. Prince	35 Ch. D. 9	572
Goodright v. Straphan	1 Cowp. 201	558
Goodson v. Richardson	Law Rep. 9 Ch. 221	607
Goodwin v. Robarts	1 App. Cas. 476	129
Goulard and Gibbs v. Sir Coutts Lindsay & Co.	4 Rep. Pat. Cas. 189	657
Grant v. Ellis	9 M. & W. 113	499
Graves v. Hicks	11 Sim. 551	323
Great Berlin Steamboat Company, In re	26 Ch. D. 616	163
Greenfield v. Hanson	2 Times L. R. 876	273
Greys Brewery Company, In re	25 Ch. D. 400	383
Griffies v. Griffies	8 L. T. (N.S.) 758	477
Griffith v. Blake	27 Ch. D. 474	657
Grissell's Case	Law Rep. 1 Ch. 528	180

H.

Haines v. Taylor	2 Ph. 209	91
Hales v. Cox	32 Beav. 118	474
Hall v. Hurt	2 J. & H. 76.	325
Hambling v. Wallani	W. N. (1889) 133	173
Hampden v. Walsh	1 Q. B. D. 189	160
Hancock v. Hancock	38 Ch. D. 78.	307
Handcock v. Handcock	1 Ir. Ch. Rep. 444	473
Harbin v. Darby	28 Beav. 325	418
Hardaker v. Moorhouse	26 Ch. D. 417	334
Hardy v. Fothergill	13 App. Cas. 351	517
Harlock v. Ashberry	19 Ch. D. 539	431
Harrison v. Blackburn	17 C. B. (N.S.) 678	79
——— v. Southwark and Vauxhall Water Company	[1891] 2 Ch. 409	192

		PAGE
Hastelow *v.* Jackson	8 B. & C. 221	168
Haywood *v.* Lowndes	4 Drew. 454; 28 L. J. (Ch.) 400	22
Heaton's Trade-mark, In re	27 Ch. D. 570	574
Heiron's Case	15 Ch. D. 139	384
Hemming, Ex parte	28 L. T. 114	288
Hengler, In re	W. N. (1892) 193; [1893] 1 Ch. 586	365
Hepburn *v.* Lordan	2 H. & M. 345	91
Herman *v.* Jeuchner	15 Q. B. D. 561	162
Hibblewhite *v.* M'Morine	6 M. & W. 200	558
Higgs *v.* Northern Assam Tea Company	Law Rep. 4 Ex. 387	179
Hill *v.* Wallasey Local Board	[1892] 3 Ch. 117	606
Hitchcock *v.* Stretton	[1892] 2 Ch. 343	288
Hobbs *v.* Wayet	36 Ch. D. 256	526
Hodson *v.* Terrill	1 C. & M. 797	168
Holdsworth *v.* Goose	29 Beav. 111	333
Hole *v.* Escott	2 Keen, 444; 4 My. & Cr. 187	333, 336
—— *v.* Harrison	1 Ch. Ca. 246; Finch, 15, 203	521
Holland *v.* Worley	26 Ch. D. 578	196
Hollingshead, In re	37 Ch. D. 651	431
Hone *v.* Boyle	27 L. R. Ir. 137	130
Horton *v.* Hall	Law Rep. 17 Eq. 437	325
Hoskins *v.* Campbell	W. N. (1869) 59	373
Hudson *v.* Revett	5 Bing. 368	558
Hudson River Telephone Company *v.* Watervliet Turnpike and Railroad Company	121 N. Y. 397	194
Hudson's Trade-marks, In re	3 Rep. Pat. Cas. 155	573
Hughes-Hallett *v.* Indian Mammoth Gold Mines Company	22 Ch. D. 561	516
Hulton, Re	62 L. T. (N.S.) 200	342
Hurdman *v.* North Eastern Railway Company	3 C. P. D. 168	198
Hurst *v.* Hunt	16 Beav. 372	333
Hussey *v.* Crickitt	3 Camp. 168	160
Hyde & Co.'s Trade-mark, In re	7 Ch. D. 724	572

I.

Inchbald *v.* Robinson	Law Rep. 4 Ch. 388	448
Irish Land Commission *v.* Grant	10 App. Cas. 14	499
Isaac v. De Friez	17 Ves. 373, n.	48
Isberg *v.* Bowden	8 Ex. 852	183
Islington and General Electric Supply, In re	W. N. (1892) 81	664

J.

Jackson, In re	40 Ch. D. 495	419
——— *v.* Ogg	Joh. 397	303
Jacques *v.* Harrison	12 Q. B. D. 136	273
James *v.* Salter	3 Bing. N. C. 544	502
Jaques *v.* Golightly	2 Wm. Bl. 1073	163
Jay *v.* Ladler	40 Ch. D. 649	391

		PAGE
Jeffryes *v.* Agra and Masterman's Bank	Law Rep. 2 Eq. 674	180
Jenkins *v.* Jackson	40 Ch. D. 71	448
Jinks *v.* Edwards	11 Ex. 775	79
Johnson, In re	[1891] 3 Ch. 48	308
Johnston *v.* Orr-Ewing	7 App. Cas. 219	571
Johnstone *v.* Hudlestone	4 B. & C. 922	79
Jones *v.* Winwood	3 M. & W. 653; 10 Sim. 150	333
Jones' Case	Cases in House of Lords, 1664–1696, forming part of Serjeant Hill's Collection in Lincoln's Inn Library	49
Jupp, In re	39 Ch. D. 148	232

K.

Kay *v.* Johnston	21 Beav. 536	475
Kearley *v.* Thomson	24 Q. B. D. 472	163
Kemp's Settled Estates, In re	24 Ch. D. 485	360
Kendrick *v.* Roberts	30 W. R. 365	173
Ker *v.* Ker	I. R. 4 Eq. 15	470
Kibble, Ex parte	Law Rep. 10 Ch. 373	647
King *v.* Jones	5 Taunt. 418	470
Knowles, In re	52 L. J. (Ch.) 685	7
Krasnapolsky Restaurant and Winter Garden Company, In re	[1892] 3 Ch. 174	238

L.

Lacey *v.* Hill	Law Rep. 18 Eq. 182	525
Langham Skating Rink Company, In re	5 Ch. D. 669	238
Langton *v.* Hughes	1 M. & S. 593	163
Lancy *v.* Athol (Duke of)	2 Atk. 444	72
Laughter *v.* Humphrey	Cro. Eliz. 524	500
Lawrance *v.* Norreys (Lord)	11 App. Cas. 210	545
Lawson *v.* Wright	1 Cox, 275	521
Lees *v.* Newton	Law Rep. 8 C. P. 658	17
Leigh (Lord) *v.* Ashburton (Lord)	11 Beav. 470	333
—— *v.* Dickeson	15 Q. B. D. 60	475
Lewis, In re	1 Q. B. D. 724	287
—— *v.* Weston-Super-Mare Local Board	40 Ch. D. 55	607
Lidiard and Jackson's and Broadley's Contract, In re	42 Ch. D. 254	500
Lightbody's Trusts, In re	W. N. (1885) 3; 33 W. R. 452	512
Liley *v.* Hey	1 Hare, 580	49
Little *v.* London Joint Stock Bank	[1891] 1 Ch. 270	126
Lloyd *v.* Dimmack	7 Ch. D. 398	525
Lock *v.* Furze	Law Rep. 1 C. P. 441	80
London and South Western Railway Company *v.* Gomm	20 Ch. D. 562	493
London, Brighton and South Coast Railway Company *v.* Truman	11 App. Cas. 45; 29 Ch. D. 89	192, 590, 600
London Joint Stock Bank *v.* Simmons	[1892] A. C. 201; [1891] 1 Ch. 270	121, 125
Long *v.* Rankin	Sugden on Powers, 8th Ed. p. 895	333
Loscombe *v.* Wintringham	13 Beav. 87	48

		PAGE
Lovelace, In re	5 Jur. (N.S.) 428, 694	351
Lowe *v.* Ross	5 Ex. 553	79
Lowestoft, Yarmouth, and Southwold Tramways Company, In re	6 Ch. D. 484	642
Lyon *v.* Morris	19 Q. B. D. 139	282
——— *v.* Reed	13 M. & W. 285	75

M.

McAndrew *v.* Bassett	4 D. J. & S. 380	572
Macdonald *v.* Longbottom	1 E. & E. 977	287
——— *v.* Whitfield	8 App. Cas. 733	527
Macdougall *v.* Jersey Imperial Hotel Company	2 H. & M. 528	104
Mackenzie, Ex parte	Law Rep. 7 Eq. 240	179
——— *v.* Everton and West Derby Permanent Benefit Building Society	61 L. T. (N.S.) 680	314
Mackintosh, In re	13 Q. B. D. 235	4
McWilliams, In re	1 Sch. & Lef. 169	17
Manning, In re	30 Ch. D. 480	13
March, In re	27 Ch. D. 166	232
Marlborough's (Duke of) Settlement, In re	30 Ch. D. 127; 32 Ch. D. 1	533
Marris *v.* Ingram	13 Ch. D. 338	4
Marshall *v.* Glamorgan Iron and Coal Company	Law Rep. 7 Eq. 129	248
——— *v.* National Provincial Bank of England	40 W. R. 328	130
Mason, In re	8 Ch. D. 411	325
Mersey Docks and Harbour Board *v.* Gibbs	Law Rep. 1 H. L. 93	192
Mersey Steel and Iron Company *v.* Naylor	9 Q. B. D. 648; 9 App. Cas. 434	184
Metropolitan Asylum District *v.* Hill	6 App. Cas. 193	21, 89, 192, 590
Middlesborough Assembly Rooms Company, In re	14 Ch. D. 104	238
Middleton *v.* Chichester	Law Rep. 6 Ch. 152	73
Millington *v.* Fox	3 My. & Cr. 338	573
Mills *v.* Farmer	1 Mer. 55; 19 Ves. 483	42
Miner *v.* Gilmour	12 Moo. P. C. 131	199
Mining Shares Investment Company, In re	[1893] 2 Ch. 660	667
Mitchell *v.* Cantrill	37 Ch. D. 56	147
——— *v.* Henry	15 Ch. D. 181	570
——— *v.* Simpson	23 Q. B. D. 373; 25 Q. B. D. 183	5
Moggridge *v.* Thackwell	7 Ves. 36	47
Morgan *v.* Rutson	16 Sim. 234	333
——— *v.* Seymour	1 Ch. Rep. 120	521
Morris *v.* Blackman	2 H. & C. 912	159
Mutual Life Assurance Society *v.* Langley	32 Ch. D. 460	57

N.

National Bolivian Navigation Company *v.* Wilson	5 App. Cas. 176	103

		PAGE
New London and Brazilian Bank v. Brocklebank	21 Ch. D. 302	180
Newbould v. Smith	33 Ch. D. 127	431
Newby v. Harrison	3 D. F. & J. 287	657
Newfoundland (Government of) v. Newfoundland Railway Company	13 App. Cas. 199	181
Newman v. Pinto	4 Rep. Pat. Cas. 508	266
Nicholl v. Bromley	2 Brod. & B. 464	302
Nickells v. Atherstone	10 Q. B. 944	77
Niemann v. Niemann	43 Ch. D. 198	247
Norman, In re	16 Q. B. D. 673	297
North v. Strafford (Earl of)	3 P. Wms. 148	500
North London Land Company v. Jacques	32 W. R. 283	271
North London Railway Company v. Metropolitan Board of Works	Joh. 405	610
Norton v. Ellam	2 M. & W. 461	303

O.

Oastler v. Henderson	2 Q. B. D. 575	79
Offley and Johnson's Case	2 Leon. 166	520
Orde, In re	24 Ch. D. 271	512
Original Hartlepool Collieries Company v. Gibb	5 Ch. D. 713	453
Orr-Ewing & Co. v. Johnston	13 Ch. D. 434; 7 App. Cas. 219	265
Owen v. De Beauvoir	16 M. & W. 547; 5 Ex. 166	498

P.

Page v. Wisden	20 L. T. (N.S.) 435	378
Paget v. Foley	2 Bing. N. C. 679	502
Paget's Settled Estates, In re	30 Ch. D. 161	484
Palmer, In re	45 Ch. D. 291	287
Palmer's Trade-mark, In re	24 Ch. D. 504	399
Parker v. Trigg	W. N. (1874) 27	475
Pawson v. Brown	13 Ch. D. 202	162
Payne v. Esdaile	13 App. Cas. 613	501
Pearce v. Morris	Law Rep. 5 Ch. 227	60
Pearks v. Moseley	5 App. Cas. 714	496
Pears v. Laing	Law Rep. 12 Eq. 41	432
Pearson v. Helliwell	Law Rep. 18 Eq. 411	325
Pearson's Case	5 Ch. D. 336.	616
Peel's (Sir Robert) School at Tamworth, In re	Law Rep. 3 Ch. 543	629
Perry-Herrick v. Attwood	2 De G. & J. 21	127
Peter v. Rich	1 Ch. Rep. 34	521
Petre v. Petre	1 Drew. 371	548
Pettinger v. Ambler	34 Beav. 542	331
Picard v. Mitchell	14 Beav. 103	325
Pieschel v. Paris	2 S. & S. 384	42
Pocock v. Attorney-General	3 Ch. D. 342	47
Prehn v. Royal Bank of Liverpool	Law Rep. 5 Ex. 92	440
Prescott v. Boucher	3 B. & Ad. 849	501
Preston v. Etherington	37 Ch. D. 104	13
Proudfoot v. Hart	25 Q. B. D. 42	273

Q.

		PAGE
Queade's Trusts, In re	33 W. R. 816; 54 L. J. (Ch.) 786	309
Quilter *v.* Mapleson	9 Q. B. D. 672	273

R.

Radnor's (Earl of) Will Trusts, In re	45 Ch. D. 402	533
Rains *v.* Buxton	14 Ch. D. 537	548
Randell, In re	38 Ch. D. 213	492
Rapier *v.* London Tramways Company	W. N. (1892) 165; [1893] 2 Ch. 588	195
Read *v.* Anderson	10 Q. B. D. 100	160
—— *v.* Richardson	45 L. T. (N.S.) 54	571
Reddaway *v.* Bentham Hemp Spinning Company	[1892] 2 Q. B. 639; 9 Rep. Pat. Cas. 503	571
Reg. *v.* Lister	Dears. & B. C. C. 209	92
—— *v.* Slade	21 Q. B. D. 433	219
Reinhardt *v.* Mentasti	42 Ch. D. 685	193
Rex *v.* Burnett	4 M. & S. 272	89
—— *v.* Carlile	6 Car. & P. 636	448
—— *v.* Cross	3 Camp. 224	450
—— *v.* Jones	3 Camp. 230	451
—— *v.* Moore	3 B. & Ad. 184	448
—— *v.* Pease	4 B. & Ad. 30	192
—— *v.* Vantandillo	4 M. & S. 73	89
Reynolds *v.* Wheeler	30 L. J. (C. P.) 350; 10 C. B. (N.S.) 561	524
Richards *v.* Butcher	[1891] 2 Ch. 522	391
Ripon (Earl of) *v.* Hobart	3 My. & K. 169	91
Robinson *v.* Kilvert	41 Ch. D. 88.	194
Roddam *v.* Morley	1 De G. & J. 1	429
Roddy *v.* Stanley	5 Ir. Jur. 10	161
Roderick *v.* Aston Local Board	5 Ch. D. 328	607
Rodgers *v.* Rodgers	31 L. T. (N.S.) 285	574
Roe *v.* Ireland	11 East, 280	501
Rogers *v.* Rice	[1892] 2 Ch. 170	273
Rosenberg *v.* Northumberland Building Society	22 Q. B. D. 373	313
Royal Society of London and Thompson	17 Ch. D. 407	626
Rylands *v.* Fletcher	Law Rep. 3 H. L. 330	590
Ryley, In re	15 Q. B. D. 329	5
Rumball *v.* Ball	10 Mod. 38	303
Russell, Son & Scott, In re	30 Ch. D. 114	293

S.

Salvin *v.* North Brancepath Coal Company	Law Rep. 9 Ch. 705	91
Sanderson *v.* Berwick-upon-Tweed (Mayor of)	13 Q. B. D. 547	84
Sanitary Carbon Company, In re	W. N. (1877) 223	647
Schove *v.* Schmincké	33 Ch. D. 546	378
Seaton *v.* Seaton	13 App. Cas. 61	467
Sebright's Settled Estates, In re	33 Ch. D. 429	334
Sheffield (Earl of) *v.* London Joint Stock Bank	13 App. Cas. 333	126

		PAGE
Shuttleworth *v.* Garnett	Carth. 90	501
Sibun *v.* Pearce	44 Ch. D. 354	312
Sicklemore *v.* Thistleton	6 M. & S. 9	302
Simes, In re	62 L. T. (N.S.) 721; 38 W. R. 570	5
Simmons *v.* London Joint Stock Bank	[1891] 1 Ch. 270; [1892] A. C. 201	125
Simpson *v.* Bathurst	Law Rep. 5 Ch. 193	333
Skegness and St. Leonard's Tramways Company, In re	41 Ch. D. 215	647
Skinners' Company *v.* Knight	[1891] 2 Q. B. 542	273
Slazenger *v.* Feltham	6 Rep. Pat. Cas. 531	580
Slevin, In re	[1891] 2 Ch. 236	48
Smith *v.* British Marine Mutual Insurance Association	W. N. (1883) 176	487
——— *v.* Day	21 Ch. D. 421	657
Snowdon, Ex parte	17 Ch. D. 44; 50 L. J. (Ch.) 540; 29 W. R. 654	516
Société Générale de Paris *v.* Walker	11 App. Cas. 20; 14 Q. B. D. 424	558
Spencer, In re	30 W. R. 296	419
Spencer's Trade-marks, In re	3 Rep. Pat. Cas. 73	399
Stamford's (Lord) Settled Estates, In re	43 Ch. D. 84.	533
Stannard *v.* Lee	Law Rep. 6 Ch. 346	378
Stedman *v.* Collett	17 Beav. 608.	287
Stirling *v.* Forrester	3 Bli. 575	524
Stock *v.* Aylward	8 Ir. Ch. Rep. 429	470
Stogdon, In re	56 L. J. (Ch.) 420	288
Stonors' Trusts, In re	24 Ch. D. 195	308
Street, In re	10 Eq. 165	288
Sturges *v.* Bridgman	11 Ch. D. 852	195
Suburban Hotel Company, In re	Law Rep. 2 Ch. 737	239
Swain *v.* Wall	1 Ch. Rep. 150	521
Swan, Ex parte	Law Rep. 6 Eq. 344	179
——— *v.* North British Australasian Company	2 H. & C. 175	128
Sykes *v.* Beadon	11 Ch. D. 170	163
Symes *v.* Hughes	Law Rep. 9 Eq. 475	163

T.

Taylor *v.* Bowers	1 Q. B. D. 291	162
——— *v.* Smetten	11 Q. B. D. 207	159
——— *v.* Taylor	Law Rep. 17 Eq. 324	323
——— *v.* ———	Law Rep. 20 Eq. 297	373
Teasdale *v.* Sanderson	33 Beav. 534.	462
Temple *v.* Thring	56 L. T. (N.S.) 283	373
Tenant *v.* Elliott	1 Bos. & P. 3	163
Thacker *v.* Hardy	4 Q. B. D. 685	160
Theological Education Society *v.* Attorney-General	21 Lathrop, 285	494
Thomas, In re	[1891] 3 Ch. 482	365
——— *v.* Cook	2 B. & Al. 119	75
Thompson *v.* Montgomery	41 Ch. D. 35; [1891] A. C. 217, 390	568
Thornton *v.* Howe	31 Beav. 14	45
Tidd *v.* Lister	5 Madd. 429	372

		PAGE
Todd *v.* Bielby	27 Beav. 353	325
Toms *v.* Wilson	4 B. & S. 442	302
Townsend *v.* Carus	3 Hare, 257	43
Trevor *v.* Whitworth	12 App. Cas. 409	242
Trustees, Executors, and Agency Company *v.* Short	13 App. Cas. 793	545
Tupper *v.* Foulkes	9 C. B. (N.S.) 797	558
Turner *v.* Cameron's Coalbrook Steam Coal Company	5 Ex. D. 932	79
——— *v.* West Bromwich Union (Guardians of)	9 W. R. 155	501
Tyler, In re	[1891] 3 Ch. 252	491

U.

Upperton, Re	91 L. T. Journ. p. 431	417

V.

Vane *v.* Vane	Law Rep. 8 Ch. 383	548
Vaughan *v.* Taff Vale Railway Company	5 H. & N. 679	192

W.

Walkden Aërated Waters Company's Application, In re	54 L. J. (Ch.) 394	574
Walker *v.* Brewster	Law Rep. 5 Eq. 25	448
——— *v.* General Mutual Building Society	36 Ch. D. 777	312
——— *v.* Hamilton	1 D. F. & J. 602	440
——— *v.* Richardson	2 M. & W. 882	77
Walmesley *v.* Butterworth	Coote on Mortgage, 3rd Ed. App. 572; 4 L. J. (N.S.) (Ch.) 253	334
Walsh *v.* Secretary of State for India	10 H. L. C. 367	492
Wanstead Local Board of Health *v.* Hill	13 C. B. (N.S.) 479	22
Warburton *v.* Farn	16 Sim. 625	333
Ward *v.* Audland	8 Beav. 201	473
Waterhouse *v.* Gilbert	15 Q. B. D. 569	282
Watson *v.* Gass	W. N. (1881) 167	475
——— *v.* Mid-Wales Railway Company	Law Rep. 2 C. P. 593	180
Webb *v.* Brooke	3 Taunt. 6	163
Weikersheim's Case	Law Rep. 8 Ch. 831	247
West, King and Adams, In re	[1892] 2 Q. B. 102	287
Whitaker, In re	34 Ch. D. 227	308
White *v.* James	26 Beav. 191	325
Wilkes *v.* Collin	Law Rep. 8 Eq. 338	211
Wilkinson *v.* Lindgren	Law Rep. 5 Ch. 570	43
Williams *v.* Harding	Law Rep. 1 H. L. 9	180
——— *v.* Kershaw	Cited 1 Keen, 229	46
Willis *v.* Howe (Earl)	29 W. R. 70	547
Wilson *v.* Church	13 Ch. D. 1; 5 App. Cas. 176	103, 109
——— *v.* Gabriel	4 B. & S. 243	181
——— *v.* Miles Platting Building Society	22 Q. B. D. 381, n.	313
——— *v.* Strugnell	7 Q B. D. 548	162

		PAGE
Withington Local Board of Health *v.* Manchester (Corporation of)	[1893] 2 Ch. 19	88
Wood *v.* Morewood	3 Q. B. 440, n	80
Wood's Trade-mark, In re	32 Ch. D. 262	262
Wooldridge *v.* Norris	Law Rep. 6 Eq. 410	518
Wotherspoon *v.* Currie	Law Rep. 5 H. L. 508	571
Wray, In re	36 Ch. D. 138	4

Z.

Zouch *v.* Parsons	3 Burr. 1794	468
Zouche (Lord) *v.* Dalbiac	Law Rep. 10 Ex. 172	499

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL

In re SMITH.
HANDS *v.* ANDREWS.

[1892 S. 397.]

C. A.
1892
KEKEWICH, J.
Nov. 5, 19.
C. A.
1893
Jan. 18; *Feb.* 13.

Attachment—Committal—Jurisdiction—Discretion—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4—*Debtors Act*, 1878 (41 & 42 *Vict. c.* 54)—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 9.

The remedy against the property or person of a debtor prohibited by sect. 9 of the *Bankruptcy Act*, 1883, is in respect of a debt, and intended to enforce payment of that debt, but the remedy by committal or attachment under the *Debtors Act*, 1869, is punishment for an offence. Therefore the prohibition contained in the Act of 1883 does not take away the jurisdiction of the Court to order, under sect. 4, sub-sect. 3, of the Act of 1869, the committal or attachment of a defaulting trustee against whom a receiving order in bankruptcy has been made.

Cobham v. *Dalton* (1) dissented from.

MOTION.

Albert Smith, who died on the 19th of September, 1891, by his will, dated the 16th of September, 1891, appointed the Defendants, *Thomas Andrews* and *Peter S. Hooton*, his trustees and executors, and devised and bequeathed all his real and personal estate to them upon trust for conversion and investment, and to pay the income to his mother during her life, and after her decease in trust for his children. The will contained a clause

(1) Law Rep. 10 Ch. 655, 657.

C. A.
1893
In re SMITH.
HANDS v. ANDREWS.

empowering the trustees to continue the business of a turf commission agent then carried on by the testator at *Liverpool*, or any other business which he might be engaged in at the time of his death, for so long as they should think fit, on the terms that his then present manager, *R. Welch*, should have the management thereof, and empowering *Welch*, during such times as the trustees continued the business, to employ agents and clerks, and generally to act in the conduct of the business as he in his discretion should think fit.

The testator at the time of his death was carrying on the business of a bookmaker and turf commission agent at a club in *Liverpool*, of which he was the principal or sole proprietor, *Welch* being manager of the bookmaking business, and *Hooton* general manager and secretary of the club.

The Defendants, *Andrews* and *Hooton*, duly proved the will, and continued to carry on the business of the testator after his death.

The estate of the testator was insufficient for the payment of his debts, and the Plaintiff, who was a creditor of the testator, on the 11th of February, 1892, commenced this action by originating summons in the *Liverpool* District Registry, for the administration of the testator's real and personal estate, and on the 26th of February, 1892, judgment was given directing usual administration accounts and inquiries.

On the taking of the accounts under the judgment it was found that a balance of £426 17*s.* 2*d.* was due from *Andrews* and *Hooton* to the estate, and on the 6th of August, 1892, an order was made, on further consideration of the action, directing them to pay that amount into Court. The £426 17*s.* 2*d.* comprised a sum of £75 which had been paid by *Andrews* and *Hooton* to their solicitor for costs, but which had been disallowed to them; a sum of £70, which appeared to have been paid to the testator's mother for the support and maintenance of his children; and a sum of £100, which had been paid into the testator's bank, and was not accounted for.

Andrews and *Hooton* did not obey the order of the 6th of August, 1892, and on the 19th of October, 1892, *D. Somers*, a creditor, who had obtained leave to attend the proceedings, and

to whom the carriage of the judgment had been committed by order of the Court, moved for leave to issue a writ or writs of attachment against *Andrews* and *Hooton* for their contempt in not having complied with the order of the 6th of August, 1892.

In opposition to this motion, *Andrews* made an affidavit (on which he was subsequently cross-examined) stating that he was unable to pay any part of the £426 17*s.* 2*d.*, and that on the 8th of September, 1892, a receiving order in bankruptcy was made against him, and the adjourned general meeting of his creditors was to take place on the 31st of October, 1892. He further stated that the sum of £100 above-mentioned was, as he understood, money received from the testator's business, which was received out of the bank by *Hooton*, and by him applied in payment of losses and disbursements in the testator's business; he accounted in a similar way for other sums, and stated that the business was conducted by *Hooton*, and that he (*Andrews*) personally took no part in it; that it was not usual to keep any books in connection with the business, except betting books, and it was customary to destroy all the betting books every week, as soon as the race meetings referred to in such books were over; that the solicitor to the trustees advised that all books and records should be destroyed every week so far as possible, the object being to destroy all evidence in the event of police raids on the club; that the Registrar surcharged the £100 and certain other sums because it was not shewn by documentary evidence how they had been applied; but that as the money was used in carrying on the business, and all books and papers were destroyed as soon as possible, no records were in existence by which the moneys could be traced or the amounts paid away satisfactorily accounted for. In cross-examination, he stated in effect that he left everything to *Hooton*, and that he believed the money received by *Hooton* was duly applied for the purposes of the business. It was admitted that the money received was paid into the bank in the joint names of *Andrews* and *Hooton*, but it did not appear whether the cheques drawn on the account were signed by both or by one of them.

Hooton also made an affidavit in opposition to the motion, and

C. A.
1893
In re SMITH.
HANDS v. ANDREWS.

was cross-examined; but no satisfactory explanation of the facts was elicited from him.

Previously to the hearing of the motion the solicitor to the trustees paid into Court the £75 which had been disallowed to *Andrews* and *Hooton*.

The motion was heard before Mr. Justice *Kekewich* on the 5th of November, 1892.

Warmington, Q.C., and *Rowden*, for the Applicant:—

There is jurisdiction to order a writ or writs of attachment to issue in this case, unless it is within the prohibition contained in the *Bankruptcy Act*, 1883, sect. 9 (1). But that prohibition refers only to proceedings which a creditor can take in respect of a debt, and the procedure by committal or attachment is by way of punishment in respect of disobedience to an order of the Court or other contempt. *Cobham* v. *Dalton* (2) was decided under sect. 12 of the *Bankruptcy Act*, 1869 (which is differently worded from sect. 9 of the Act of 1883), and is therefore not an authority directly in point, and moreover it is not in accordance with the later cases. There *Mellish*, L.J. (3), said that arrest for debt was intended as a means of enforcing payment, and not as a punishment. But that is contrary to *Marris* v. *Ingram* (4), which has always been regarded as a leading authority. In *In re Mackintosh* (5) the jurisdiction of the Chancery Division was recognised by Mr. Justice *Cave*, sitting in Bankruptcy. So in *In re Wray* (6) the procedure by attachment was treated as punitive, and therefore not within the prohibition in the Act of 1883.

[KEKEWICH, J.:—In that case Mr. Justice *North* relied on the

(1) By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 9 (1): "On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose."

(2) Law Rep. 10 Ch. 655.

(3) Ibid. 657.

(4) 13 Ch. D. 338.

(5) 13 Q. B. D. 235.

(6) 36 Ch. D. 138.

fact of the defendant being a solicitor: see *Oswald* on Contempt (1); and on the appeal the question of discretion was alone discussed.]

In *Mitchell* v. *Simpson* (2) it was held that an order of committal, by reason of its punitive character, was not an attachment for debt under sect. 14 of the *Sheriffs Act*, 1887. No doubt your Lordship's decision in *In re Simes* (3) is against us; but that was founded on *Cobham* v. *Dalton* (4), and *In re Ryley* (5) was also relied on—a case which, since *Mitchell* v. *Simpson*, must be treated as overruled—while *In re Wray* (6) was not cited.

[KEKEWICH, J.:—After what was said by Mr. Justice *Chitty* in *In re Edye* (7), I am bound to review my decision in *In re Simes*. But it is to be observed that *In re Edye* was the case of a solicitor.]

The reasoning in that case did not turn upon that circumstance: see *In re Gent* (8), where the jurisdiction was upheld in the case of a receiver, as being a person in a fiduciary position. The result of all the authorities is that *Cobham* v. *Dalton* can no longer be regarded as a binding authority, and that sect. 9 of the Act of 1883 does not apply to a person who is under a duty towards the Court, but only to one who owes a debt to an individual creditor.

Then, upon the merits, the jurisdiction being established, this is a clear case for the exercise of it. The only real defence is that on the part of *Andrews*, who seeks to throw the blame on his co-trustee. But by his own shewing he neglected the trust altogether, and owing to his culpable negligence the loss to the trust estate has occurred, and he is morally as well as legally responsible equally with his co-trustee.

Renshaw, Q.C., and *Durandu*, for the Defendant *Andrews*:—

The present case is covered by the decision of the Court of

(1) Pages 82, 83.
(2) 23 Q. B. D. 373; 25 Q. B. D. 183.
(3) 62 L. T. (N.S.) 721; 38 W. R. 570.
(4) Law Rep. 10 Ch. 655.
(5) 15 Q. B. D. 329.
(6) 36 Ch. D. 138.
(7) 63 L. T. (N.S.) 762; 39 W. R. 198.
(8) 40 Ch. D. 190, 199.

C. A.
1893
In re SMITH.
HANDS *v.* ANDREWS

Appeal in *Cobham* v. *Dalton* (1), which has never been overruled, and was decided on sect. 12 of the Act of 1869, which, for the present purpose, is practically undistinguishable from sect. 9 of the Act of 1883. The object of that section was to protect from their creditors persons against whom receiving orders were made, and the Plaintiff in this action, which is a creditor's action for administration, answers the description of the section literally and in substance. The reason for the application of the enactment is, in truth, stronger under the Act of 1883 than it was under the Act of 1869, as a debt incurred by breach of trust is now provable in bankruptcy, and it is only in cases of "fraud or fraudulent breach of trust" (words which are also used in the *Trustee Act*, 1888, sect. 8, extending the statutes of limitation), that the discharge of the bankrupt does not release such a debt. *Cobham* v. *Dalton* was followed, and the principle of it applied in *In re Ryley* (2). The contrary decisions were cases in which the defaulter was a solicitor or other officer of the court, and proceed on the ground that the jurisdiction of the Court over its own officers is not interfered with by the statute: *In re Deere* (3), *In re Wray* (4), and *In re Edye* (5) were all cases of solicitors, and *In re Gent* (6) was the case of a receiver, who was an officer of the Court.

[KEKEWICH, J.:—*In re Wray* does not seem to be consistent with *Cobham* v. *Dalton*.]

It is perfectly consistent with, and was, in fact, grounded on *In re Deere*, reported in the same volume of the Law Reports as *Cobham* v. *Dalton*. *Marris* v. *Ingram* (7) has no bearing, except so far as it shews that under the *Debtors Act*, 1869, punishment was intended in certain cases—a proposition which is not disputed. *In re Mackintosh* (8) merely decides that as a general rule the Court of Bankruptcy will not interfere with the exercise of the jurisdiction by other courts. *Cobham* v. *Dalton* was not referred to in the judgment of Mr. Justice *North* in *In re Wray*, or in that of

(1) Law Rep. 10 Ch. 655.
(2) 15 Q. B. D. 329.
(3) Law Rep. 10 Ch. 658.
(4) 36 Ch. D. 138.
(5) 63 L. T. (N.S.) 762; 39 W. R. 198.
(6) 40 Ch. D. 190.
(7) 13 Ch. D. 338.
(8) 13 Q. B. D. 235.

Mr. Justice *Chitty* in *In re Edye* (1), and there is no indication that either of those learned Judges intended in any way to impugn or depart from it. *In re Simes* (2), on the other hand, was grounded on *Cobham* v. *Dalton* (3); it was the case of a trustee who was not an officer of the Court, and it is therefore an authority directly in our favour.

Then upon the merits we submit that this is a case in which the Court, in the exercise of its discretion, will not make an order against the Defendant *Andrews*, it not being shewn that he put any trust money into his own pocket, or that any of it was ever in his actual physical control: *Earl of Aylesford* v. *Earl Poulett* (4), following *In re Knowles* (5), and shewing that, since the *Debtors Act*, 1878, the Court will not make an order for committal or attachment of a defaulting trustee, unless there is in his conduct something approaching to fraud.

The Defendant *Hooton* appeared in person.

[KEKEWICH, J., said that he did not desire to hear a reply upon the question of jurisdiction, but only upon that of discretion.]

Warmington, in reply:—

This case is totally different from *Earl of Aylesford* v. *Earl Poulett*. In that case the trustee never had any direct control of the money, and none at all except by way of continuation of the state of things which existed in the lifetime of the testator. Here the whole of the money has been received by *Andrews*, who has been guilty of conduct amounting to fraud. The facts proved against the defaulter in *Marris* v. *Ingram* (6) were less grave than those proved here against *Andrews*.

1892. Nov. 19. KEKEWICH, J.:—

Upon the first point I have prepared a written judgment, which I now proceed to read.

There ought to be no hesitation on my part, and in truth

(1) 63 L. T. (N.S.) 762; 39 W. R. 198.
(2) 62 L. T. (N.S.) 721; 38 W. R. 570.
(3) Law Rep. 10 Ch. 655.
(4) [1892] 2 Ch. 60.
(5) 52 L. J. (Ch.) 685.
(6) 13 Ch. D. 338.

C. A.
1893
In re SMITH. HANDS *v.* ANDREWS.
Kekewich, J.

there is none, to review my decision in *In re Simes* (1). The fact that *In re Wray* (2) was not cited sufficiently justifies that course, and the additional fact that in *In re Edye* (3) Mr. Justice *Chitty* expressed his disapproval of my decision is conclusive. What would have happened in *In re Simes* if *In re Wray* had been cited I will not pretend to say; for the latter case, standing alone, might not have been treated as sufficient authority to overrule *Cobham* v. *Dalton* (4), which was decided on an Act not substantially different from that of 1883 now in force, and which, seeming to me still, as it then did, directly in point, could not have been lightly set aside. Having now had the advantage of full argument and criticism of all the authorities, my opinion is that *Cobham* v. *Dalton* must be treated as, I will not say overruled, but of no binding authority. The difficulty has been to extract from the different cases an authoritative rule for the construction of the enactment of 1883, and in particular to ascertain whether that rule may safely be regarded as having being followed in *In re Wray*. My conclusion is that there is a rule such as was suggested by Mr. *Warmington*, and I venture to state it in language partly adapted from the judgment of the Master of the Rolls in *Mitchell* v. *Simpson* (5). The remedy against the property or person of a debtor prohibited by the 9th section of the *Bankruptcy Act*, 1883, is in respect of a debt in the sense of being intended to enforce payment of that debt, but the remedy by committal or attachment under the *Debtors Act*, 1869, is punishment for an offence. That is the view of Mr. Justice *Chitty* expressed in *In re Edye*, of Mr. Justice *North's* judgment in *In re Wray*, and is to my mind fully supported by reference to that judgment. It was also the view alike of the Divisional Court and of the Court of Appeal in *Mitchell* v. *Simpson*, which though resting on a contrast between a different section of the *Debtors Act*, 1869, not with the *Bankruptcy Act*, 1883, but with the *Sheriffs Act*, 1887, is a highly instructive authority. It would, I think, be misinterpreting the language

(1) 62 L. T. (N.S.) 721; 38 W. R. 570.
(2) 36 Ch. D. 138.
(3) 63 L. T. (N.S.) 762; 39 W. R. 198.
(4) Law Rep. 10 Ch. 655.
(5) 25 Q. B. D. 188.

of the several judges before whom these cases have come, to say that there is a distinction between orders against such persons as may be described as officers of the Court, and orders against other persons acting in a fiduciary capacity. Mr. Justice *North* has expressly said in *In re Gent* (1), that his judgment in *In re Wray* (2) was not restricted to solicitors, but was applicable to all persons acting in a fiduciary capacity, and I fail to discover any reason for a limitation which that learned Judge disavowed. It has been observed that *Cobham* v. *Dalton* (3) was not mentioned by Mr. Justice *North* in his judgment in *In re Wray*, or by Mr. Justice *Chitty* in *In re Edye* (4). But note that it was commented on in argument before Mr. Justice *North*, and that though he did not expressly mention *Cobham* v. *Dalton*, he did mention the case of *In re Deere* (5), which follows it, and which was linked with it in the comments of counsel; and note also that Mr. Justice *Chitty*, criticising my judgment, could not have failed to consider *Cobham* v. *Dalton*, on which that judgment was rested, though he did not expressly refer to it. When *In re Wray* came before the Court of Appeal the point of jurisdiction was not argued. True it is that the Appellant's counsel argued that if an attachment was not there allowed it could never be allowed under the provisions in the *Debtors Act*, 1869; but this received no attention from the Court, which disposed of the case entirely on the point of discretion. On the other hand, it is to be observed that Mr. Justice *North* upheld the jurisdiction, though he declined to exercise it by ordering an attachment, and that he had directed the defaulting debtor to pay the costs of the application, which he was incompetent to do if he had been incompetent to order an attachment; and that jurisdiction is treated by Lord Justice *Cotton*, delivering the judgment of the Court, as unquestionable. Counsel for the Respondent was not called on, and does not appear to have raised the question of jurisdiction, so that the judgment ought perhaps not to be treated as a decision on the point; but I repeat that, reading that case in conjunction with the other authorities to which I have referred, the proper

(1) 40 Ch. D. 199.
(2) 36 Ch. D. 138.
(3) Law Rep. 10 Ch. 655.
(4) 63 L. T. (N.S.) 762; 39 W. R. 198.
(5) Law Rep. 10 Ch. 658.

C.A.
1893
In re SMITH.
HANDS v. ANDREWS.
Kekewich, J.

conclusion, to my mind, is that a Court of first instance is at liberty, and if at liberty is bound, to consider itself relieved from *Cobham* v. *Dalton* (1) as a binding authority. Setting that aside, I think the other cases enable me to construe the 9th section of the *Bankruptcy Act*, 1883, in a manner more in harmony with the provisions of the *Debtors Act*, 1869. It would be strange if the Legislature, after having expressly excepted from the general abolition of imprisonment for debt, default by a trustee, or person acting in a fiduciary capacity (*Debtors Act*, 1869, sect. 4), had repealed the exception by language not expressly referring to it, and covering it, if at all, only by general words; and it is satisfactory to find sufficient authority for avoiding such a conclusion.

The jurisdiction, then, being thus upheld, it falls now to me to determine whether I ought to exercise it at all in this case; and, if so, to what extent. I have read all the evidence, and I have heard the arguments of counsel. I have given Mr. *Hooton* every opportunity of explaining himself, and I have thought over the matter to the best of my ability, with every desire not to press with undue hardness on these gentlemen, or any others in a fiduciary capacity. I accept what is said by Mr. Justice *North* in the case of *Earl of Aylesford* v. *Earl Poulett* (2), adopting the decision of Mr. Justice *Kay* in *In re Knowles* (3), that "the exception contained in sect. 4, sub-sect. 3, of the *Debtors Act*, 1869, was intended for the punishment of fraudulent trustees, not merely in order to inflict personal inconvenience on the defaulters, but to deter other trustees from committing fraudulent breaches of trust"; and I accept what Mr. Justice *North* himself said respecting a trustee who is not fraudulent, and has committed a comparatively venial offence. But it seems to me that if, on a fair consideration of all the facts, I come to the conclusion, in this or any other case, that I have before me a fraudulent trustee, then I am bound to exercise the discretion vested in me by the *Debtors Act*, 1878, by doing what Mr. Justice *Kay* refers to in *In re Knowles*, attempting not so much to inflict personal inconvenience as to deter other trustees from committing

(1) Law Rep. 10 Ch. 655. (2) [1892] 2 Ch. 60.
(3) 52 L. J. (Ch.) 685.

fraudulent breaches of trust. What is the meaning of the word "fraud"? Of course, if a trustee puts into his own pocket, or applies to his own purposes, speculates with, or makes away with money belonging to his *cestui que trust—i.e.*, money that is not his, he is only in language distinguishable from a thief; and about his fraudulent character there can be no doubt whatever. On the other hand, when a trustee yields to the influence of charity or sympathy and pays to widows or infants in distress money which he knows ought not to go to them, but which he ought to hoard up and keep according to the mandate of the trust instrument, though, perhaps, he is guilty of a breach of trust, he cannot, in my opinion, be said to be a fraudulent trustee. He may be very wrong; his good nature may, and often does, amount to folly; but he is after all doing that which I have heard one of the most eminent of Equity Judges, the late Sir *George Jessel*, describe as committing an "honest breach of trust." The Court is always unwilling to visit a breach of trust of that kind with serious results. But it seems to me that there may be dishonesty amounting to fraud well within those two extreme cases, and I am bound to say that, in my opinion, a trustee, whoever he is, whether of a deed or will, who, having accepted the trusts, and knowing that he has to provide, it may be, for children or for a wife entitled for her separate use at the present time, or for legatees or creditors, simply does nothing at all, but walks away and leaves others to see to his duty, is dishonest. He is a man of no moral character, or not shewing any morality in the performance of his duty. I am not, of course, referring to the cases, which have been dealt with by many Judges, where a trustee is acting under the advice of a solicitor or other person competent to advise him. It is necessary that a trustee should have advice; it is natural that he should trust a professional man, whether the solicitor of the testator, or some other well known to himself; and there again the Court, though possibly obliged to visit the trustee with some consequences, regards him as not otherwise than an honest man. But when he does nothing, having accepted a duty, in my opinion he is dishonest, and according to my experience, extending now over a great many years, and moderately large in the matter of trusts, the largest

C. A.
1893
In re SMITH.
HANDS v. ANDREWS.
Kekewich, J.

amount of mischief is caused by trustees accepting duties and omitting to perform them. That is what, it seems to me, *Andrews* did in this case, according to his own shewing. I take his own statements, in which he says he knew he was trustee of the will; he knew he had duties to perform; that he was acting in a fiduciary capacity according to the language of the Act; and, according to his own account, he did nothing at all, but left it all to *Hooton*. The money was paid into the bank in their joint names; but whether he signed the cheques, or gave *Hooton* authority to sign them, I do not know. He does not seem to have taken the slightest care to know that the money had been applied, and when the estate comes to be wound up we find that the sum of £426 17*s.* 2*d.*, less the £75 which has been recovered, is gone. I will leave out of that the sum which was paid for the widow and children, which comes within the discretion to which I referred just now; still it cannot even then be reduced below £280 out of this small estate; and the result is, the creditors have to go without the money due to them. I have been unable to find the slightest suggestion of an excuse for his conduct; and though he endeavours to take the account to pieces, and make out that he is not responsible for these moneys, I cannot accept his explanation. I think it most unsatisfactory. As regards the £100, his statement is especially unsatisfactory. If there is one business more than another in which attention is required on the part of a trustee, and care that moneys received should be put into the bank and only applied for proper purposes, I should say it is a business of this kind—a betting commission business, so far as I can make out. My judgment against Mr. *Andrews* proceeds upon that, without going further. Without going on to say that he put any money into his own pocket, I think that, having accepted the office of trustee, he simply neglected it, and thereby wronged those whom it was his paramount duty to protect. In my opinion, that is dishonest; and by such conduct he makes himself a fraudulent trustee, and punishable as such. If that is not the opinion of others, no doubt some day or other we shall know it in other cases in which the subject will be discussed; but I intend to act upon that rule until I am corrected.

[His Lordship then dealt with the case of the Defendant *Hooton*, and after stating that his evidence was unsatisfactory, and that his position was worse than that of his co-defendant *Andrews*, continued:—]

I think I should be wanting in my duty, painful as it is, if I hesitated to say that a writ of attachment must issue. That must be done; and, of course, *Andrews* and *Hooton* must be ordered to pay the costs.

C. C. M. D.

C. A.

The Defendants appealed. The appeal was heard on the 18th of January, 1893.

Renshaw, Q.C., and *Durandu*, for the Defendants.

S. Hall, Q.C., and *Rowden*, for the Applicant.

[On the question of jurisdiction the arguments were the same as in the Court below, the following additional authorities being cited: *Middleton* v. *Chichester* (1); *Crowther* v. *Elgood* (2); *Preston* v. *Etherington* (3); *In re Manning* (4).

It was also contended on behalf of the Defendant *Andrews* that, in holding that a person was dishonest who, having accepted the office of trustee, simply did nothing, and that by such conduct he made himself a fraudulent trustee and punishable as such, the learned Judge had acted upon an erroneous principle, and had therefore not judicially exercised the discretion vested in him by the *Debtors Act*, 1878.]

1893. Feb. 13. The judgment of the Court (Lord *Esher*, M.R., *Lindley* and *Lopes*, L.JJ.) was read by

LINDLEY, L.J.:—

This is an appeal by two executors and trustees against an order directing a writ of attachment to issue against them under the authority conferred by the *Debtors Act*, 1869, s. 4, sub-s. 3, and amended by the *Debtors Act*, 1878 (41 & 42 Vict. c. 54).

On the 6th of August, 1892, an order was made in an action

(1) Law Rep. 6 Ch. 152.
(2) 34 Ch. D. 691.
(3) 37 Ch. D. 104.
(4) 30 Ch. D. 480.

C. A.
1893
In re SMITH.
HANDS
v.
ANDREWS.

for the administration of their testator's estate on both the Appellants to pay into Court £426 found due from them jointly; and an order was also made on the Appellant *Hooton* to pay into Court £90 found due from him separately. There was no summons to vary the Chief Clerk's certificate, and the liability of the Defendants to pay these sums into Court as ordered must be treated as indisputable. On the 8th of September a receiving order in bankruptcy was made against *Andrews*. The moneys not being paid, notice of motion for an attachment against both Appellants was served on the 19th of October, 1892. Before this motion came on to be heard, viz., on the 1st of November, 1892, *Andrews* was adjudicated bankrupt. On the 19th of November the order appealed from for the issue of an attachment against both Defendants was made. No proceedings in bankruptcy have been taken against *Hooton*. It becomes necessary, therefore, to consider their cases separately.

It will be convenient to take *Hooton's* case first, as it is the simpler of the two. He was an executor and trustee; he was ordered to pay money by a Judge of the High Court exercising the jurisdiction formerly exercised by Courts of Equity. The money which he was ordered to pay was the balance of moneys come to his hands and not accounted for by him. He had not got the money in his possession nor under his control when the order for the payment of it into Court was made; for he had misapplied the money which had come into his hands. But this circumstance did not excuse him from his liability to pay, nor prevent an order for attachment from being made under the *Debtors Act*, 1869. Courts of Equity refuse to allow a man to derive any benefit from his own wrongful conduct, and treat a trustee as still having that which he once had and ought still to have, although he may in fact have wrongfully parted with it. Acting on this principle, it was decided by the Court of Appeal in Chancery, as early as 1871, that an attachment might issue under sect. 4, sub-sect. 3, of the *Debtors Act*, 1869, against a trustee who made default in obeying an order to pay into Court money which he had received as trustee, but had misapplied before the order for payment was made: *Middleton* v. *Chichester* (1);

(1) Law Rep. 6 Ch. 152.

and the construction then put upon the Act has been followed ever since: see *Crowther* v. *Elgood* (1); *Preston* v. *Etherington* (2). It was pointed out in *Middleton* v. *Chichester* (3), by Lord *Hatherley* (4), that all the debts specified in sect. 4 of the *Debtors Act*, 1869, in respect of which imprisonment was not abolished, were different from ordinary debts and were "debts the incurring of which was in some degree worthy of being visited with punishment," and (5) he says: "In every case there is something of the character of delinquency pointed out."

In 1869, if an order for payment was made under sect. 4 and was disobeyed, an attachment was issued as a matter of course. But this was altered by the *Debtors Act*, 1878, under which a judge applied to for an order for an attachment is entrusted with a discretion to grant or refuse the order. If, therefore, an order for attachment is made in a case falling within sect. 4 of the *Debtors Act*, 1869, this Court will not interfere with the exercise of the discretion of the Judge making the order, unless it can be shewn that he has not exercised his discretion in the particular case, or that he has manifestly proceeded on a wrong ground: see *Crowther* v. *Elgood*. Nothing of the kind is shewn in *Hooton's* case, and his appeal, therefore, ought to be dismissed.

The same principles are applicable to *Andrews's* case, save so far as they are affected by his bankruptcy. But the *Bankruptcy Act*, 1883, contains a section, viz., sect. 9, sub-sect. 1, which is as follows: "On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose." This section is in substance the same as the corresponding section in the earlier *Bankruptcy Act* of 1869 (sect. 12). This last section was held by

(1) 34 Ch. D. 691.
(2) 37 Ch. D. 104.
(3) Law Rep. 6 Ch. 152.
(4) Ibid. 6 Ch. 156.
(5) Law Rep. 6 Ch. 157.

C. A.
1893
In re SMITH.
HANDS v. ANDREWS.

the Court of Appeal, in *Cobham* v. *Dalton* (1), to prevent an arrest without the leave of the Court of Bankruptcy, even in cases falling within sect. 4, sub-sect. 3, of the *Debtors Act*, 1869. It becomes necessary, therefore, to examine this case, and to determine whether it can be regarded as an authority which ought still to be followed, regard being had to subsequent legislation and to more recent decisions.

The subsequent legislation which is important consists, first, of the *Debtors Act*, 1878, which has been already noticed, and, secondly, of the *Bankruptcy Act*, 1883, which has replaced the *Bankruptcy Act*, 1869. The operative words in sect. 9, sub-sect. 1, of the *Bankruptcy Act*, 1883, are the same as those in sect. 12 of the previous Act of 1869; and, although the two sections are not exactly the same, there is no difference between them material for the present purpose. Under both Acts, money due from a trustee in respect of a breach of trust, whether fraudulent or not, is a debt provable against his estate in the event of his bankruptcy. But there is a very remarkable difference between the two Acts as regards the effect of an order of discharge; for whilst under sect. 49 of the *Bankruptcy Act*, 1869, an order of discharge did not release a bankrupt from any breach of trust, under sect. 30 of the *Bankruptcy Act*, 1883, an order of discharge does release a bankrupt from all breaches of trust except fraudulent breaches of trust to which he was a party. Now, in *Cobham* v. *Dalton*, a defaulting trustee had been ordered to pay money into Court; and, on the same day that the order was made, he was adjudicated bankrupt. An order for his attachment was afterwards made *ex parte*, and he was arrested. He then applied in Chancery to be discharged. His application was refused. He appealed, and his appeal was allowed. The Court of Appeal treated sect. 12 of the *Bankruptcy Act*, 1869, as applicable to the case, and treated the money ordered to be paid into Court as a provable debt, although it was not a debt due to the person who obtained the order to pay and the order for the attachment. The Court further held that the debt, being a provable debt, the bankrupt was protected until discharged from arrest in respect of it; but that, as the Act then in force did not discharge him

(1) Law Rep. 10 Ch. 655.

from the debt, he could be attached for it after his discharge. If the principle of this case is to be applied to the present case, it will follow that *Andrews* ought not to be arrested pending his bankruptcy, nor after his discharge, unless his liability to pay the £426 arose from some fraudulent breach of trust to which he was a party, which is not the case.

Although *Cobham* v. *Dalton* (1) was decided in 1875, and *Middleton* v. *Chichester* (2) was decided in 1871, and the Lords Justices who decided *Cobham* v. *Dalton* were members of the Court which decided *Middleton* v. *Chichester*, the view there taken and expressed with reference to the punitive character of sect. 4 of the *Debtors Act*, 1869, seems to have been overlooked by them. Lord Justice *James* does not allude to it; Lord Justice *Mellish* (3) said: "Now arrest for debt is intended as a means of enforcing payment, not as a punishment, for if the party pays the debt he is entitled to be discharged." This observation was true of ordinary debts: *In re M'Williams* (4); *Lees* v. *Newton* (5); but not of obligations to pay under orders made under sect. 4, sub-sect. 3, of the *Debtors Act*, 1869. The punitive character of sect. 4 of the *Debtors Act*, 1869, which was pointed out in *Middleton* v. *Chichester*, has been since so often recognised that it cannot now be questioned: see *Marris* v. *Ingram* (6); *In re Gent* (7); although the Court has, under the Act of 1878, a discretion to grant or refuse an attachment in cases falling within it; and in one of the latest cases, viz., *Earl of Aylesford* v. *Earl Poulett* (8), an attachment against a defaulting trustee was refused. *In re Ryley* (9), *In re Manning* (10), *Preston* v. *Etherington* (11), and *Mitchell* v. *Simpson* (12) were referred to in the course of the argument; but they are not decisions upon the effect of sect. 9 of the *Bankruptcy Act*, 1883, upon commitments under sect. 4 of the *Debtors Act*, 1869. In these cases, however, the fact that a commitment under that section is not to be regarded simply as a form of civil process,

(1) Law Rep. 10 Ch. 655.
(2) Ibid. 6 Ch. 152.
(3) Ibid. 10 Ch. 657.
(4) 1 Sch. & Lef. 169.
(5) Law Rep. 1 C. P. 658.
(6) 13 Ch. D. 338.
(7) 40 Ch. D. 190.
(8) [1892] 2 Ch. 60.
(9) 15 Q. B. D. 329.
(10) 30 Ch. D. 480.
(11) 37 Ch. D. 104.
(12) 25 Q. B. D. 183.

C. A.
1893
In re SMITH. HANDS v. ANDREWS.

but as punitive, is distinctly recognised. Having regard to the *Debtors Act*, 1878, and to the decisions to which we have referred, it would be clearly wrong now to apply Lord Justice *Mellish's* observation in *Cobham* v. *Dalton* (1), above quoted, to obligations to pay money in obedience to orders made under the *Debtors Act*, 1869, s. 4, sub-s. 3.

Mr. Justice *Kekewich* therefore had, in our opinion, jurisdiction under the *Debtors Act*, 1869, to order an attachment against *Andrews* notwithstanding his bankruptcy. But in this case the learned Judge exercised the discretion reposed in him by the *Debtors Act*, 1878, upon a ground which, in our opinion, was erroneous. *Andrews* trusted his co-trustee *Hooton*, and handed money to him, and this money was misapplied. *Andrews* is liable for it; but he was not himself guilty of any dishonesty or fraudulent breach of trust. Mr. Justice *Kekewich* ordered an attachment to issue against him on the broad ground that every trustee who trusts his co-trustee, and remits trust money to him, and does not look sharply after him, is dishonest and fraudulent. We cannot agree in this view, and, consistently with the principles upon which this Court acts in reviewing discretionary orders, we have come to the conclusion that *Andrews's* appeal ought to be allowed. In doing so, we are not acting contrary to *In re Deere* (2). In that case, a solicitor who had become bankrupt was attached by a Baron of the Court of Exchequer, under the 4th section of the *Debtors Act*, 1869, and he applied to the Court of Bankruptcy to release him, but the Court refused. The Court of Bankruptcy had, under the *Bankruptcy Act*, 1869, which was then in force, a discretion in the matter; but it declined to interfere, and Lord Justice *Mellish* said: "I think it is not right that this Court should decide the question whether the attachment was issued for punishment or merely to enforce compliance with the order for payment of money. That question ought to be decided by the Court which made the order." This decision and passage is not in point in the present case, for by "this Court" was meant, in *In re Deere*, the Court of Appeal sitting in bankruptcy. That Court was not entertaining, and had no jurisdiction to entertain, an appeal from the order for

(1) Law Rep. 10 Ch. 655. (2) Law Rep. 10 Ch. 658, 660.

arrest. The present appeal is an appeal from the order for the attachment, and we have to rehear that order; and *Ex parte Deere* (1), therefore, is not really in point.

The result, therefore, of the appeal is, that it succeeds in *Andrews's* case, but not in *Hooton's*. The order appealed from must therefore be discharged so far as it affects *Andrews*; but this is not a case for giving him any costs. As regards *Hooton*, the order will stand; but nothing will be gained by making him pay the costs of the appeal, nor has he materially put his opponents to expense by joining *Andrews* in his appeal.

Solicitors: *Nicholson & Pemberton, Liverpool*, agents for *Pownall & Co., London; W. F. Gorst, Liverpool*, agent for *Wynne, Holme, & Wynne, London.*

W. J. B.

WITHINGTON LOCAL BOARD OF HEALTH *v.* CORPORATION OF MANCHESTER.

C. A.
1893
CHITTY, J.
Jan. 20, 21, 24, 25, 31.
C. A.
Feb. 6, 7.

[1893 W. 67.]

Local Government—Small-pox Hospital—Right of Local Authority to build Hospital beyond their District—Noxious Business—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 112, 131, 285.

A local urban authority proposed to erect a temporary small-pox hospital on land of their own within the district of an adjoining local authority without their consent. The adjoining local authority brought an action and moved for an injunction to restrain them from erecting the hospital:—

Held (affirming the decision of *Chitty*, J.), (1.) that the small-pox hospital was not a noxious or offensive business within sect. 112 of the *Public Health Act*, 1875; (2.) that the local authority were empowered under sect. 131 to establish a hospital outside their own district without the consent of the local authority of the district in which they established it; (3.) that sect. 285, requiring the consent of the local authorities of adjoining districts, had no application to such a case. The injunction was therefore refused.

THIS was a motion by the *Withington* Local Board for an injunction to restrain the Corporation of *Manchester* from erecting a temporary small-pox hospital within the district of the Plaintiffs.

(1) Law Rep. 10 Ch. 658.

C. A.
1893
WITHINGTON LOCAL BOARD OF HEALTH v. CORPORATION OF MANCHESTER.

The Plaintiffs' district is on the south of the district of the corporation, which it immediately adjoins. It contains an area of about 5700 acres with a population of about 26,000; the population of *Manchester* being above 500,000. Within the district of *Manchester* there is a hospital for infectious diseases called the *Monsall Hospital*, in which small-pox patients are now accommodated. That hospital is at present full; but around the hospital there is vacant land, on which it was stated that additional buildings might be erected for the reception of small-pox patients.

In the district of the Plaintiffs there is a cemetery comprising about ninety-seven acres, for the benefit of the population of *Manchester*, which belongs to the Corporation of *Manchester*. An outbreak of small-pox had taken place in *Manchester*, and the corporation proposed to erect a temporary hospital for small-pox patients on land within the boundary of the cemetery, but at present unused. The hospital was intended to receive sixty patients. The unused part of this cemetery is laid out as a recreation-ground, and is used by large numbers of the poorer classes of the inhabitants of *Manchester*. The Plaintiffs' district is being rapidly built over. Under these circumstances, the Plaintiffs resisted the proposal of the corporation of *Manchester* to erect a small-pox hospital within their district, and brought the present action, and moved for an *interim* injunction to restrain them from doing so.

A similar motion was made at the same time by Mr. *Crofton*, the keeper of an hotel in *Withington*, in an action which he had brought against the Corporation of *Manchester* on the ground that the proposed hospital would be a nuisance at common law. This motion was refused on the grounds stated at the commencement of Mr. Justice *Chitty's* judgment, and need not be further referred to.

The motion came on for hearing before Mr. Justice *Chitty* on the 20th of January, 1893.

Farwell, Q.C., *Clare*, and *Norris*, for the Plaintiffs, the *Withington* Local Board:—

We rest our claim for relief on the provisions of the *Public*

Health Act, 1875 (1). The setting up and carrying on of a small-pox hospital within our district will be the setting up and carrying on of a "noxious or offensive trade or business," within the meaning of sect. 112 of the *Public Health Act*, 1875, which cannot be done without our consent in writing. To do this is illegal: *In re Cork and Youghal Railway Company* (2). By using the word "business" in the section, it is clear that it was intended to prohibit something more than the specified trades. A hospital is a "business": *Bramwell* v. *Lacy* (3); and a small-pox hospital is a noxious business.

[*Metropolitan Asylum District* v. *Hill* (4) was referred to.]

The power to provide a hospital conferred by sect. 131 is

(1) 38 & 39 Vict. c. 55, s. 112: "Any person who, after the passing of this Act, establishes within the district of an urban authority, without their consent in writing, any offensive trade; that is to say, the trade of—blood-boiler, or bone-boiler, or fell-monger, or soap-boiler, or tallow-melter, or tripe-boiler, or any other noxious or offensive trade business or manufacture, shall be liable to a penalty not exceeding £50 in respect of the establishment thereof, and any person carrying on a business so established shall be liable to a penalty not exceeding forty shillings for every day on which the offence is continued, whether there has or has not been any conviction in respect of the establishment thereof."

Sect. 113: "Any urban authority may from time to time make bye-laws with respect to any offensive trades established with their consent either before or after the passing of this Act, in order to prevent or diminish the noxious or injurious effects thereof."

Sect. 131 (which is in a part of the Act headed "Hospitals"): "Any local authority may provide for the use of the inhabitants of their district hospitals or temporary places for the reception of the sick, and for that purpose may themselves build such hospitals or places of reception; or contract for the use of any such hospital or part of a hospital or place of reception; or enter into any agreement with any person having the management of any hospital, for the reception of the sick inhabitants of their district, on payment of such annual or other sum as may be agreed on. Two or more local authorities may combine in providing a common hospital."

Sect. 285 (one of the sections under the head "Union of Districts"): "Any local authority may, with the consent of the local authority of any adjoining district, execute and do in such adjoining district all or any of such works and things as they may execute and do within their own district, and on such terms as to payment or otherwise as may be agreed on between them and the local authority of the adjoining district; moreover two or more local authorities may combine together for the purpose of executing and maintaining any works that may be for the benefit of their respective districts or any part thereof."

(2) Law Rep. 4 Ch. 748.

(3) 10 Ch. D. 691.

(4) 6 App. Cas. 193.

C. A.
1893
WITHINGTON LOCAL BOARD OF HEALTH v. CORPORATION OF MANCHESTER.

exercisable by a local authority only within its own district: *Haywood* v. *Lowndes* (1). Sect. 285 enables a local authority to go into an adjoining district, with the consent of the local authorities of that district; but such consent is a condition precedent, and this consent has not been obtained by the Defendants. A local authority, created by statute for a specific purpose, has those powers only which the statute confers, and, consequently, a local authority which is empowered to provide a hospital in an adjoining district, with the consent of the local authority of that district, has no power to provide a hospital there without such consent. Again, where the Legislature intended to confer a power exercisable without the district, it says so in distinct terms; and where there is no reference as to the district, the inference is exercisable only within the district; therefore, the result of sects. 131 and 285 is that the Defendants must have our consent before they can erect this hospital.

On the balance of convenience and inconvenience, why expose this healthy district to the risk of infection? The evidence as to the danger from infection and the character of the nuisance is overwhelming.

[CHITTY, J.:—Do you contend that a small-pox hospital is a noxious business and a nuisance ἁπλῶς?]

Yes; because from present experience you cannot exclude the possibility of infection by aerial dissemination.

[*Byrne*, Q.C., on this point referred to *Fleet* v. *Metropolitan Asylums Board* (2).]

Byrne, Q.C., and *Macmorran* (*Maberly*, with them), for the Defendants:—

Sect. 112 only applies to trades noxious and offensive *per se*, such as those specified in the earlier part of the section, and the words, "other noxious or offensive trade or business," mean business or trade *ejusdem generis* with the trades just enumerated. This construction was adopted in *Wanstead Local Board of Health* v. *Hill* (3), which was under the *Public Health Act*, 1848, in which

(1) 4 Drew. 454; 28 L. J. (Ch.) 400.
(2) 2 Times L. R. 361, 363.
(3) 13 C. B. (N.S.) 479.

similar words are used, and in *Braintree Local Board* v. *Boyton* (1), under the *Public Health Act*, 1875, where the trade of a fried-fish shop was held not to be *per se* noxious. The "business" of a hospital is not noxious or offensive *per se*.

The powers conferred by sect. 131 are not confined to the district of the local authority by whom they are to be exercised; and sect. 285 is an enabling section, and does not import any limitation into sect. 131. Where the Legislature intended to confer powers exercisable within the district, it says so in distinct terms; and where it is silent as to the district, the inference is that the power is exercisable without as well as within.

[Counsel referred to numerous sections of the *Public Health Act* in support of this proposition.]

Haywood v. *Lowndes* (2) is no authority on the construction of the *Public Health Act*, 1875. Defendants, therefore, are entitled to erect this hospital without any previous consent being obtained from the Plaintiffs. The Defendants intend to comply with the by-laws in force in the Plaintiffs' district.

Farwell, in reply:—

Sect. 285 must refer to and include sect. 131. What are the "works and things" referred to in sect. 285? The words are wide, and must have been intended to include, among other things, the building and providing a hospital.

CHITTY, J.:—

What I propose to do is to decide a portion of this case. On one point, viz., the effect of sects. 131 and 285, I think I must reserve my judgment; but I will proceed to dispose of the motion in the action of *Crofton* v. *Corporation of Manchester*, and of a portion of the argument that has been addressed to me in the second action.

[His Lordship then proceeded to deal with the case of alleged nuisance by *Crofton* and others, the owners and occupiers of adjoining property, coming to the conclusion that there was not that *consensus* of opinion among experts that would justify the Court, under present circumstances, in holding that the

(1) 48 J. P. 582. (2) 4 Drew. 454; 28 L. J. (Ch.) 400.

C. A.
1893
WITHINGTON LOCAL BOARD OF HEALTH v. CORPORATION OF MANCHESTER.
Chitty, J.

establishment of the hospital on the site proposed would necessarily be a nuisance to the Plaintiffs, and that the Plaintiffs had accordingly not established a sufficient case for the interference of the Court by injunction, and continued:—]

Then, with regard to the case of the *Withington* Local Board, that stands upon different grounds. They are not entitled to complain under the head of common law nuisance. Their case is founded on the provisions of the *Public Health Act* of 1875. The point which I propose now to deal with is an entirely separate one from that which I reserve.

Their case under the first head depends upon the 112th section, and it is argued for them that the setting up and the carrying on of a small-pox hospital will be the setting up and carrying on of a "noxious or offensive trade or business" within the meaning of the 112th section. If they are right in that, they would be entitled to an injunction, because such a trade or business cannot be carried on within the Plaintiffs' district without their consent in writing.

The 112th section has already received a judicial construction. The section consists in the first instance of an enumeration of certain specified trades which are described as offensive, and which, according to the common notions of mankind, are offensive trades. The section is: Any person who establishes within the district of an urban authority, without their consent in writing, any offensive trade, that is to say, the trade of a blood-boiler, bone-boiler, fell-monger, soap-boiler, tallow-melter, or tripe-boiler (and then come in the general words upon which the Plaintiffs rely), the persons who infringe this section are liable to a penalty, and, as a penalty is imposed, the thing in respect of which the penalty is imposed, I need not say, is made unlawful. The words at the end are: "Any other noxious or offensive trade business or manufacture."

The Court of Common Pleas, in *Wanstead Local Board of Health* v. *Hill* (1), had before it practically the same point, on a similar section of the *Public Health Act* of 1848, the specified trades not being identical, but very similar, and the question raised was whether brick-making was an "other noxious or offensive

(1) 13 C. B. (N.S.) 479.

business, trade, or manufacture" within the meaning of the section. There was a strong Court of four Judges, consisting of Chief Justice *Erle*, Mr. Justice *Williams*, Mr. Justice *Willes*, and Mr. Justice *Keating*, and the substance of the judgment is this —that to bring the case within the general words, the business or trade must be, of itself, of a noxious or offensive nature, and analogous to those specified. Now, no one can say that the carrying on of a small-pox hospital, is the carrying on of a business analogous to any of those specified. It has been decided that the carrying on of a hospital, private or public, is a business: *Bramwell* v. *Lacy* (1), and so far the Plaintiffs are right; but it is impossible to hold that it is a business or trade analogous to those specified. I shall not go through them again; I did so partly, I dare say, during the argument, and I have read them. There has been a subsequent decision with regard to fish-frying: *Braintree Local Board* v. *Boyton* (2), a case in which there was more to be said against the trade, and more to be said in favour of its being brought within the section; and it was held there that it did not fall within the general words. I base my decision on the authority of the case in Common Pleas, and, moreover, on the principles which are laid down in those judgments. It appears to me that I should be misreading this section if I held that this hospital was a noxious trade or business within the meaning of it. It is very forcibly pointed out by the late Mr. Justice *Willes*, in his judgment, that the primary jurisdiction to which recourse is had, in regard to the 112th section is that of the justices, and it is not intended, as he thought, and as I think, that the justices should have to decide difficult cases arising upon that section. Their task would necessarily be easier, and is easier, where it is held—in accordance, as I think, with the intention of the Legislature—that you must find the trade to be analogous, and there is no reasonable ground for saying that the carrying on of a small-pox hospital is an analogous business to those that are enumerated.

That disposes of one not unimportant point in the *Withington Case*; as to the other point, I prefer to reserve my judgment.

I take the opportunity of saying that the case has occupied a

(1) 10 Ch. D. 691. (2) 48 J. P. 582.

C. A.
1893
WITHINGTON LOCAL BOARD OF HEALTH v. CORPORATION OF MANCHESTER.
Chitty, J.

very considerable portion of the public time in argument; but I think the parties must be satisfied that their counsel on each side have left no stone unturned—have left no argument unnoticed; and I add, that I think the time has not been for a moment uselessly occupied, and that the arguments have been to the point, although the point is one which has to be searched for through the very numerous sections of this *Public Health Act.* It has been of the greatest assistance to the Court that, upon so important a question as the one upon which I have reserved my judgment, the Court should have had the opportunity of hearing from counsel, not at too great a length, everything they could properly urge on either side.

Jan. 31. CHITTY, J.:—

The question reserved depends upon the true meaning of sect. 131 and sect. 285 of the *Public Health Act,* 1875. The Defendants propose to build on their own ground within the Plaintiffs' district, which adjoins their own, a hospital for the use of sick inhabitants of their own district. The Defendants intend to use the hospital for the reception of small-pox patients; but on the question reserved, there is no distinction between patients suffering from infectious sickness such as small-pox, and patients suffering from a non-infectious sickness. The propositions for which the Plaintiffs contend are, first, that the powers as to hospitals conferred by sect. 131 are, on the true construction of that section, exercisable by a local authority, only within their own district; and, secondly, that sect. 285 applies to these powers, and enables a local authority to exercise them within an adjoining district, but only with the consent of the local authority of such adjoining district. The propositions for which the Defendants, on the other hand, contend are, first, that the powers of sect. 131 are not confined to the district of the local authority by whom they are exercisable, but are unlimited in point of space; and, secondly, that sect. 285 has no application to the exercise of powers under sect. 131. The arguments on each side were supported by an elaborate examination of the provisions of the two sections themselves, and by copious references to numerous other sections of the Act bearing, or supposed to

bear, on the question. In fact, the Act, which contains 343 sections, was ransacked by counsel, and nothing that had any relevancy was omitted in the discussion.

The general scheme of the Act is to divide *England*, except the metropolis, into districts, and to subject these districts to the jurisdiction of local authorities invested with the powers conferred by the Act. Hence it is said for the Plaintiffs, that the consideration of the particular provisions of the Act, must be approached with due regard to this general scheme, and consequently, with a presumption that the powers conferred on a local authority are restricted in their exercise to the particular district for which they are specially constituted, and the decision of Vice-Chancellor *Kindersley* in *Haywood* v. *Lowndes* (1) is relied upon in support of the argument. The soundness of the argument may be admitted if it is advanced merely in a general way; the presumption is merely of a *primâ facie* nature, which may be displaced by an examination of the Act itself. Another argument of a general nature put forward for the Plaintiffs was that a corporation created by statute for a specific purpose has those powers only which the statute confers, and, consequently, that a local authority which is empowered to provide a hospital in an adjoining district with the consent of the local authority of that district has no power to provide a hospital there without such consent. Stated in a general way, the argument is correct. The question, however, is whether it applies to this case. The ground on which the Plaintiffs' case rests is not simply that the Defendants are acting *ultrà vires*. If that were all, the Plaintiffs would have no right of action, although the Attorney-General might complain. But the Plaintiffs say that the Defendants are invading their district unlawfully, because the Plaintiffs' consent is rendered necessary by sect. 285 and has not been given, and that by reason of their consent being required by the statute they have a sufficient interest to support their action. To succeed, it is plain that the Plaintiffs must shew that sect. 285 applies.

In addition to these observations of a general character, there is another which strikes me as pertinent. When the Plaintiffs'

(1) 4 Drew. 454; 28 L. J. (Ch.) 400.

C. A.
1893
WITHINGTON LOCAL BOARD OF HEALTH v. CORPORATION OF MANCHESTER.
Chitty, J.

counsel speak of the Defendants invading the Plaintiffs' district and interfering with their jurisdiction, and when they say that the care of the health of the inhabitants of their district is committed to the Plaintiffs' charge, it must be borne in mind that the powers and jurisdiction of the Plaintiffs as the local authority are of a special and limited kind strictly defined by the Act. One thing is clear. If a wealthy and charitably disposed person were minded to set up a hospital for the sick within the Plaintiffs' district, the Plaintiffs could not stop him. They would have no power of interference with the establishment or the management of the hospital as such. They could of course require plans of the building and drains to be submitted and generally could exercise all their powers in regard to infection and the like, just as they could in reference to any other house or building within their district; but they could not prohibit the erection or carrying on of any such hospital, even though it was established for the reception of patients suffering from infectious diseases. All this was necessarily admitted by the Plaintiffs' counsel after a careful examination of the statutes. The Plaintiffs' case, then, comes to this—that their consent is required only where it is a local authority that purposes to provide the hospital within the Plaintiffs' district.

I proceed now to examine shortly sect. 131. It is altogether silent as to the place where the hospitals or temporary places for the reception of the sick are to be situate. An examination of upwards of forty other sections of the Act gives the following result: The powers and duties of the local authority are in some cases in express terms made exercisable within their own district; in others in express terms both within and without; and in others no mention is made, one way or the other, as to district or place. Of the last class examples are found in the section under consideration (sect. 131), and also, amongst others, in sect. 141 (as to mortuaries), sect. 164 (as to recreation-grounds), sect. 165 (as to clocks), sect. 39 (as to urinals, &c.), and sects. 120, 121, and 122 (as to disinfection). In these circumstances it is argued for the Plaintiffs that where the Legislature intends to confer a power exercisable without the district it says so in direct terms, and, consequently, that where there is silence as to the district, the

inference is that the power is exercisable only within the district; while, on the other hand, it is contended for the Defendants that where the Legislature intends to confer a power exercisable within the district, it says so in direct terms, and, consequently, where there is silence as to the district, the inference is that the power is exercisable without as well as within the district. These contending arguments, which would have delighted the mediæval schoolmen, are calculated to reduce the matter to a standstill. The right practical method of interpretation is not to sweep every section which is silent as to district into one and the same class, but to consider each of these sections, with its context, separately, with a view to ascertain whether it is or is not intended to be confined to the district. I do not intend to venture to put a construction on each of the sections where silence is preserved as to the district; I confine myself to saying that I can see reasons which tend to restrict some of the sections to the particular district, but which would not be applicable to others of the same set of sections. On the whole, I think that silence as to place affords some ground in this Act for holding that the Legislature did not intend to confine the local authority to its own particular district.

Continuing the examination of the 131st section, I find the term "district" occurs twice. The hospital which the local authority may provide is "for the use of the inhabitants of their district," and the agreement which they are authorized to enter into is for the reception "of the sick inhabitants of their district." The attention of the Legislature was, therefore, directed in the section itself to the district of the local authority; yet the section does not in terms confine the local authority to its own district as the place where the hospital or other accommodation for the sick is to be provided. Again, for the purpose of providing a hospital or temporary place for the reception of the sick, the local authority are empowered, (*a*) to "contract for the use of any such hospital or part of a hospital or place of reception," and (*b*) to "enter into any agreement with any person having the management of any hospital for the reception of the sick inhabitants of their district." "Any such hospital" and "any hospital" in these clauses mean, *primâ facie*, any hospital for the sick

C. A.
1893
WITHINGTON LOCAL BOARD OF HEALTH v. CORPORATION OF MANCHESTER.
Chitty, J.

anywhere, and I can find no sufficient reason for saying that the hospital or place of reception in respect of which the local authority may enter into a contract or agreement must be confined to a hospital or place of reception within the district of the local authority. On the other hand, I see reasons for holding that the *primâ facie* meaning is the right one. A local authority, not having provided a hospital of its own, purposes to enter into an agreement with persons having the management of a hospital outside its own district for the reception of its sick inhabitants; the local authority may be a rural sanitary authority, having but few sick. It seems reasonable and convenient that they should be at liberty to send their sick to any hospital, wherever situate. Why should the local authority within which the hospital happens to be situate, and which authority has, as already shewn, no power to interfere with the hospital as such, have a special veto as to the sick to be brought there, simply because the sick are sent by another local authority? And, what is more strange, a veto only in the case of the sick being sent by the local authority of an adjoining district? If the Plaintiffs are right, no local authority can contract to send their sick to a seaside convalescent home out of their own district. I can find no sufficient ground for saying they cannot. The evidence affords a curious illustration of the effect of the Plaintiffs' contention. The Plaintiffs, under an agreement they have come to with the managers of the *Monsall Hospital*, are sending their sick to that hospital, which is situated within the district of the Defendants; yet, if their contention is right, the agreement is of no effect, and they are not justified in sending their sick to the *Monsall Hospital*, unless they first obtain the consent of the Defendants. The provisions of sect. 131 are not severable; the hospital to be provided is for the sick, without any distinction as to the nature of the sickness, whether it be infectious or not; and the powers to provide a hospital or temporary place for the reception of the sick must, one and all, either be confined to the district, or must, one and all, without distinction, be exercisable without regard to place. The test to ascertain whether the powers are severable is to try and read the sections, inserting the limitation of place as to some of the provisions, and omitting such limitation as to others. I

invited the Plaintiffs' counsel so to write out the section, and, after some attempts, he rightly admitted that it was impossible. No distinction, then, can be maintained between the cases of the local authority providing the hospital (*a*) by themselves building it, or (*b*) by contracting for the use of a hospital belonging to others, or (*c*) by entering into an agreement with persons having the management of a hospital.

One other observation remains to be made on sect. 131. It concludes with a provision empowering any two or more local authorities to combine in providing a common hospital. This power of combining is not confined to adjoining districts, but is general, and the place where the common hospital is to be situate is not specified.

For these reasons I think that sect. 131 must be read as it stands, and that in the exercise of the powers thereby conferred local authorities are not confined to their own districts.

I have already to some extent necessarily dealt with sect. 285. In my opinion it does not apply to sect. 131. It is not a negative, but an affirmative section. It occurs in an entirely distinct part of the Act. The Act is divided into parts, and under such parts sections are grouped together under distinct headings. Sect. 131 occurs in "Part III., Sanitary Provisions," which embraces sects. 13 to 143, both inclusive. Sect. 131 is grouped with sects. 132 and 133 under the heading of "Hospitals." Sect. 285 occurs in "Part VIII., Alteration of Areas and Union of Districts," which embraces sects. 270 to 292, both inclusive. Sect. 285 is found with other sections under the heading of "Union of Districts." One would hardly expect to find a limitation on sect. 131 in so different a part of the Act. Sect. 131, with its special power for authorities to combine for the purpose of providing a common hospital, seems not to require any supplementary provision. But I admit that in so complex an Act of Parliament as this is, observations on the particular place where provisions are found are not of any great weight. The Plaintiffs' argument rested on the first sentence of sect. 285, which runs thus: "Any local authority may, with the consent of the local authority of any adjoining district, execute and do in such adjoining district all or any of such

C. A.
1893
WITHINGTON LOCAL BOARD OF HEALTH v. CORPORATION OF MANCHESTER.
Chitty, J.

works and things as they may execute and do within their own district, and on such terms as to payment or otherwise as may be agreed on between them and the local authority of the adjoining district." The section then proceeds thus: "Moreover, two or more local authorities may combine together for the purpose of executing and maintaining any works that may be for the benefit of their respective districts or any part thereof." The Plaintiffs asked me to read the words "execute and do within their own district," as applying to the cases where the power is confined by implication or just construction to the district of the authority purposing to execute it, and consequently as including sect. 131, inasmuch as that section is, as they say, confined to the local authority's own district. But I have declined so to read sect. 131, and I think sect. 285 was not intended to limit the powers conferred by sect. 131. Again, the Plaintiffs' contention would restrict what I may term the hospital powers exclusively to the district of the local authority providing the hospital and the adjoining districts. I think that such a construction of the Act is too narrow. The powers of a local authority to acquire land by agreement are not confined to land within their own district. (See sect. 175.) Suppose a local authority desires to acquire a site for a hospital on some open moor near their own district, but separated from it for a short distance by an intervening district adjoining their own. The land may be bought without the consent of the local authority within whose district it lies; but no hospital can be provided there if the Plaintiffs are right, because the requisite statutory consent cannot possibly be given. The only body that can give the statutory consent is the local authority of an adjoining district; but in the case supposed the hospital would not be within any adjoining district; and the consent of the local authority within whose district the hospital would be situate would be of no avail. It would be absurd to suggest that the consent of the local authority of an adjoining district to the establishment of a hospital within another non-adjoining district would satisfy the statute. The Plaintiffs' counsel pressed for an exhaustive definition of the "works and things" intended to be included within the first part of the 285th section. I am not

bound to do that which the Legislature has not done, and I decline to frame any such definition. It is obvious that there are many works and things to which the section would readily apply without including a hospital and without drawing in the 131st section. I am content to say that, in my opinion, the building and providing of a hospital by a local authority on their own ground in an adjoining district are not the kind of works and things to which the 285th section was intended to apply.

The result is, that I hold that the Plaintiffs have failed in their contention on the point raised under sects. 131 and 285 of the *Public Health Act*, 1875. I refuse the injunction, and make no order except that costs be costs in the action.

W. C. D.

C. A.

From this judgment the Plaintiffs appealed.

The appeal was heard on the 6th of February, 1893.

Gully, Q.C., *Farwell*, Q.C., and *Clare*, for the Appellants.

Sir *R. Webster*, Q.C., *Byrne*, Q.C., and *Macmorran*, for the Defendants, were not called on.

LINDLEY, L.J.:—

This is an appeal from the decision of Mr. Justice *Chitty*, refusing to restrain the Corporation of *Manchester* from erecting a small-pox hospital on land of their own in a district of which the *Withington* Local Board of Health is the urban sanitary authority. The judgment of Mr. Justice *Chitty* has been read. It appears to me to be right from beginning to end upon every point. But there are one or two observations I will make with reference to the arguments which have been addressed to us.

First of all let us consider who the Plaintiffs are, and what they must prove in order to entitle them to any relief in this action. They are the urban sanitary authority of the district called the *Withington* district, which is near *Manchester*. They have certain statutory rights and statutory duties, and unless

C. A.
1893
WITHINGTON LOCAL BOARD OF HEALTH v. CORPORATION OF MANCHESTER.
Lindley, L.J.

their statutory rights are infringed, or they are prevented from performing their statutory duties, they have no right to complain at all. The position of the Defendants is that they are a municipal corporation having some land (about 100 acres) in the district of which the Plaintiffs are the urban sanitary authority, and what the Defendants are proposing to do is to build a hospital on their own land.

Next, let us consider upon what ground the Plaintiffs can interfere with them or prevent them from doing that. I put out of sight the broad ground that the hospital will be a public nuisance, because that question does not arise in this action. That will arise in another action which we are told is pending, which is in the form, I understand, of an action by the Attorney-General. Apart from the question of public nuisance, the Plaintiffs can only rely upon certain sections in the *Public Health Act* of 1875 (38 & 39 Vict. c. 55), and they rely, first of all, on sect. 112, which is the noxious trade section.

Now, before I make any observations upon that particular section and upon the decisions which have already been given explaining the meaning of it, I must point out that the word "hospital" does not occur in the section at all. "Infectious diseases and hospitals" are specially mentioned, and specially provided for, in another group of sections beginning with sect. 120 —the very next group but one. It would, therefore, be rather strange if we were to find language in sect. 112—general language —relating to hospitals when they are specifically mentioned and dealt with in another part of the Act. This is an observation which I have not noticed in Mr. Justice *Chitty's* judgment, but it is one which to my mind is very strong indeed. Bearing that in mind, when we are asked to say that a hospital is a noxious or offensive business within sect. 112, my answer is that *primâ facie*, it is not, because we find other provisions specially addressed to hospitals, and we do not want this section in order to deal with them. When we look at the words of sect. 112, such as "blood-boiler, bone-boiler, fell-monger, soap-boiler, tallow-melter, tripe-boiler," and these other words, "any other noxious or offensive trade business or manufacture," and when you bear in mind that those words have been construed already so as not

to include businesses which may or may not be noxious, the conclusion at which I have arrived is clear and strong, that even assuming a hospital to be in some sense a noxious business, still it is not a noxious business to which sect. 112 has any application; but it is a thing to be dealt with under the other group of sections, which relate specifically to hospitals and infectious diseases. That is the short answer to the first contention of the Plaintiffs that they are entitled to prevent the Defendants from erecting a hospital in the Plaintiffs' district without their consent. Sect. 112, to my mind, has nothing whatever to do with it.

The next point raised is, that under sects. 131 and 285 combined the Plaintiffs are entitled to say to the Corporation of *Manchester*: "You cannot erect this hospital upon this piece of land without our consent." Let us look to see how that matter stands. First of all, let me assume that the *Manchester* Corporation, having got this piece of land, which is their own property, have got funds applicable to the erection of a hospital for small-pox patients. Assume that they have got funds to which the *Public Health Act* has no relation at all. Can you spell out of the *Public Health Act* any prohibition against the *Manchester* Corporation building a hospital upon their own land? There, again, I say it is utterly impossible. I am not going through the sections in detail; it has been very skilfully done by Mr. *Gully*, and partly by Mr. *Clare*, and exhaustively by the learned Judge in the Court below; and after spelling through those forty or fifty sections the result is that you cannot get out of them anything like a prohibition which prevents the owner of land from building a hospital upon it. But it is put in another way. It is said: "Well, but the Corporation of *Manchester* are going to build this hospital out of rates which they have no power to raise except under the *Public Health Act*, and therefore the *Public Health Act* must be drawn in, to warrant them in doing what they are about to do." I suppose that is so. Let us look for a moment at sect. 131, and see whether it is possible to put upon that section the limited construction contained in that argument: "Any local authority" —that will include the Corporation of *Manchester*—" may provide

C. A.
1893
WITHINGTON LOCAL BOARD OF HEALTH v. CORPORATION OF MANCHESTER.
Lindley, L.J.

for the use of the inhabitants of their district hospitals or temporary places for the reception of the sick, and for that purpose" —and for this purpose they may do these four things: "Themselves build such hospitals or places of reception"—no limitation whatever as to place—"or contract for the use of any such hospital or part of a hospital or place of reception"—no limitation as to place—"or enter into any agreement with any person having the management of any hospital, for the reception of the sick inhabitants of their districts, on payment of such annual or other sum as may be agreed on"—again no limitation as to place—or, "Two or more local authorities may combine in providing a common hospital"—no limitation as to place there either. I think it is perfectly impossible to read that section and get out of it any implied prohibition against building the hospital, or contracting for the use of a hospital, or entering into any agreement with anybody having the management of a hospital, out of the district of a particular local board. Of course, if they cannot get it without exercising compulsory powers that is quite another matter; but that is not the case with which we have to do.

Then reliance is placed upon another section—sect. 285. The observations made by the learned Judge, Mr. Justice *Chitty*, upon sects. 131 and 285 cannot, in my opinion, be improved upon. He notices what is worthy of attention—that they occur in totally different parts of the Act of Parliament; and the argument based upon sect. 285 really breaks down when you observe that it is confined to adjoining districts, and does not extend to districts which do not adjoin. No argument based upon that section for the purpose of getting out of it a prohibition such as is wanted by the Appellants can be supported. I cannot, upon that point, add anything to what the learned Judge has said; it appears to me that when these Appellants base their case upon the sections in the *Public Health Act*, they hopelessly fail.

That being so, we need not discuss the convenience or inconvenience. The Plaintiffs have no right to their injunction: that is the short answer to the appeal, and it must be dismissed with costs.

LOPES, L.J.:—

I entirely agree with the judgment of Mr. Justice *Chitty*. I think it is an admirable judgment, and I can add nothing to it. But there is one observation I would like to make with regard to sect. 112.

If I had been called upon to interpret that section, I should have come to the conclusion, independently of any other sections of the Act, that it had no application to hospitals of this kind. I think the words "any other noxious or offensive trade, business, or manufacture" must be read as contemplating something *ejusdem generis* with those preceding those words. I am clearly of opinion that a hospital is not an analogous kind of business. Assuming it to be a business, as I do, and assuming it for the purpose of what I am now upon to be noxious, I think it is not an analogous business with any of those mentioned, and on that ground I should have held it did not come within sect. 112.

But when I look to the next heading—"Infectious Diseases and Hospitals"—beginning at sect. 120, and find that hospitals and things connected with hospitals are specially dealt with under that heading, and in sections which follow that heading, I am very much confirmed in the view which I have already expressed with regard to the true interpretation to be put upon sect. 112. It seems inconceivable that the Legislature intended hospitals to have been included in the enumeration of noxious businesses mentioned in sect. 112, when we find the Legislature immediately afterwards in express terms dealing with those very businesses. I do not desire to say anything with regard to sects. 131 and 285, because I entirely agree with every word in regard to the true interpretation to be put upon those sections that was uttered in the Court below by Mr. Justice *Chitty*.

In regard to the question of the balance of convenience, that is a question which has not to be considered, because we are here dealing with the construction to be put upon an Act of Parliament. Shortly, I say this—that I find nothing in this *Public Health Act* of 1875 which prohibits the Defendants from erecting a hospital on their own ground.

C. A.
1893
WITHINGTON LOCAL BOARD OF HEALTH v. CORPORATION OF MANCHESTER.

KAY, L.J.:—

I entirely agree, and should add nothing except from a motive of respect to the able and admirable arguments. There are several points that were put to us as to which I feel bound to say a few words. I agree with the result at which the learned Judge in the Court below has arrived, and I think it may be put upon grounds rather stronger than the reasons for which he arrived at his conclusion. A good deal has been said in the course of the argument in this case about the nuisance and annoyance and possible injury to the neighbourhood. I agree that much of that was said in order to make out that this was a noxious business; except for that purpose no argument of that kind can possibly be used in this particular case. The action is by the local board of *Withington*, who say, "You have no right to erect this hospital upon your own ground, which is within our district, without our consent." That depends entirely upon the construction of this Act of Parliament, about which so much argument has been addressed to us—the *Public Health Act*. This is a motion for an interlocutory injunction; but the Plaintiffs, who say, "Our consent is requisite before you can build this hospital upon your own land," are bound to make that out as the first step to the relief which they ask. The question is simply Aye or No. Is that the meaning of this Act of Parliament? Does it make the consent of the *Withington* Local Board requisite before the *Manchester* Corporation can make this use of their own land within the *Withington* district?

Now on section 112 I confess that my opinion has wavered a good deal during the argument. First of all I was rather inclined to doubt whether you could call this a business at all, and whether, if it was a business, it was a noxious business; but the real question is: Even if it can be considered a business, and even if it can be considered a noxious business, does it come within that section? I have come to the conclusion that, even if you could consider the carrying on of a small-pox hospital to be a noxious business, it is not one of the noxious businesses to which section 112 is addressed. I think it is difficult to say that it is not a business, and probably a business within the meaning of the word as used in that section, because, as Mr.

Clare particularly pointed out in his most ingenious argument, if it were carried on for the purpose of profit by an individual, as it might be, like the numerous private surgical hospitals in *London*, it certainly would be a business then. A proceeding or an operation is not made into a business because it is carried on for the purposes of a profit; otherwise, you might say, if it does not produce profit it is not a business, which would be ridiculous. Therefore, *primâ facie*, it seems to me it is made out to be a business.

Then, upon the other question—Is it noxious or not noxious? —I confess I think a great deal may be said in favour of the view that it is noxious *per se*—that the establishment of a small-pox hospital, which is one of the most infectious diseases known, and which generally does produce an increase of small-pox cases in the neighbourhood of the hospital by some means or other (the means not being quite thoroughly recognised even by medical authority) is establishing a business which, in one meaning of the word, is of a noxious kind.

But then, is it a noxious business within the meaning of this section? The section is one of a group which is headed with the words "Offensive Trades." Then it goes on to particularize certain trades which are as unlike the carrying on of a hospital as could possibly be imagined, and it contains, no doubt, the words, at the end of the enumeration of the particular trades, "any other noxious or offensive trade, business, or manufacture." You have got the word "business" there put in between the words "trade" and "manufacture," undoubtedly meaning that that section is to apply to what are ordinarily called trades, businesses, or manufactures; and it gives the local authority a power of veto over the establishment or commencement of a trade, business, or manufacture which is noxious or offensive. I agree that it would be possible to construe that section as including within the word "business," and possibly—I do not say more—within the word "noxious" also, the establishment of a small-pox hospital, if you did not look to the rest of the Act of Parliament. But the very next group of sections, the one beginning with sect. 120, is headed "Infectious Diseases and Hospitals." Then you have a number of sections applying

C. A.
1893
WITHINGTON LOCAL BOARD OF HEALTH v. CORPORATION OF MANCHESTER.
Kay, L.J.

to hospitals distinctly. To my mind it is impossible to read this Act of Parliament so as to include within the group of sections headed "Offensive Trades" the establishment of a hospital, when you find another and separate group of sections actually addressed to hospitals and to infectious diseases which give the urban authority such powers as the Act intended they should have with reference to institutions of that kind. For that reason, which was not so much, I think, insisted upon by Mr. Justice *Chitty*, it seems to my mind that the proper construction of this Act of Parliament is that a hospital, though it may be a business, and though it may be a noxious business, is not within the provisions of sect. 112, which require the consent of the district within which the hospital is being erected before it can be so erected.

On the other point, a very ingenious argument was raised upon sects. 131 and 285. I really can add nothing to what has been said by the learned Judge in the Court below, whose argument I follow and agree with entirely, and I also agree with what Lord Justice *Lindley* has said.

I think, on both grounds, the appeal fails; and it is plain, as I have said, that no consideration of convenience or inconvenience can possibly arise on this discussion if the Plaintiffs fail to make out, as I think they have failed, that their consent is necessary before this hospital can be erected upon the land within their district which belongs to the Corporation of *Manchester*. They have to make that out under the Act of Parliament, and I can see nothing which makes their consent necessary—nothing which gives them a power of veto; and therefore for this reason I think the appeal must be dismissed, with costs.

I will only say one word as to another point which has been raised in argument, and that is this. It was suggested that the *Manchester* Corporation, in building this hospital, were exceeding their own powers. Now, with that the *Withington* Local Board have nothing on earth to do. It is a point which cannot be raised in this action at all. If that is to be raised it must be raised by the Attorney-General in an action properly framed in the nature of an information, and the point must be raised by pleadings and evidence. I understand there are no pleadings

and evidence addressed to that point in this case at all. Therefore I think that argument cannot be made use of.

C. A.
1893
WITHINGTON LOCAL BOARD OF HEALTH v. CORPORATION OF MANCHESTER.

Solicitors for the Plaintiffs: *Chester & Co.*, agents for *Crofton & Craven, Manchester.*

Solicitors for the Defendants: *Austin & Austin*, agents for *W. H. Talbot*, Town Clerk, *Manchester.*

M. W.

In re WHITE.
WHITE *v.* WHITE.

[1892 W. 1184.]

C. A.
1892
KEKEWICH, J.
Oct. 28; *Nov.* 2.
C. A.
Dec. 17, 19.
1893
Jan. 14; *Feb.* 8.

Will—Gift—Charity—"Religious Societies"—Blanks in Will—General Charitable Intent.

A bequest to a religious institution, or for a religious purpose, is *primâ facie* a bequest for a "charitable" purpose; and the law applicable to "charitable" bequests, as distinguished from the law applicable to ordinary bequests, ought to be applied to a bequest to a religious institution, or for a religious purpose.

A testator gave his property "to the following religious societies, viz. * to be divided in equal shares among them," the particular objects not being named:—

Held (reversing *Kekewich*, J.), that the testator's personal estate was subject to a trust for "charitable" purposes; and a scheme was directed as to such part of it as was pure personalty at the testator's death.

ADJOURNED SUMMONS.

The late Rev. *Ebenezer White*, a Dissenting minister, who died in 1859, by his will, dated in 1849, gave his residuary estate to trustees upon trust for sale, and, subject to successive life interests to his widow and a niece, he proceeded:—"I do give and bequeath the whole of my property to the following religious societies, viz. * to be divided in equal shares among them."

The will was written on one side of several sheets of note-paper, fastened together bookwise. On the back, or blank, sheet opposite the sheet on which the above clause was written were the following words, which were written by the testator after his execution of the will:—"* Viz. the *Tract Society*, the *Home*

C. A.
1893
In re WHITE.
WHITE v. WHITE.

Missionary Society, the *London Missionary Society*, the *Colonial Missionary Society*." Upon the will being proved, the Court refused to admit to probate the words on the blank, or back, sheet.

This was an originating summons by a legal personal representative of the testator, who was also one of his next-of-kin, to have it declared that the testator died intestate as to the capital of his residuary estate, and that, subject to the then subsisting life interest, his next-of-kin were entitled to such capital.

The summons was heard before Mr. Justice *Kekewich* on the 28th of October, 1892.

J. F. Mills, for the Plaintiff.

Warmington, Q.C., and *Edward Ford*, for the Defendant, one of the next-of-kin:—

This is not a gift to charity at all. It is simply an incomplete gift to unnamed objects. There is, in short, nothing to feed the *videlicet*. The gift is, therefore, void for uncertainty, and the Court will not presume a charitable intent: *Mills* v. *Farmer* (1); *Ewen* v. *Bannerman* (2); *Aston* v. *Wood* (3). A gift to a "religious" society is not necessarily charitable: *Cocks* v. *Manners* (4).

Rigby, S.-G., and *Ingle Joyce*, for the Crown:—

The cases applicable to a gift of this kind amount to this, that, although the testator may, by leaving blanks in his will, have failed to carry out his intention of giving to particular charities, yet the Court will give effect to the charitable intention: *Pieschel* v. *Paris* (5). *Ewen* v. *Bannerman* and *Aston* v. *Wood* do not apply. In the former case it was found absolutely impossible to put any construction at all upon the blanks; and in the latter case the Court could do no more than guess the testator's intention. We submit that a gift to a "religious society" is a good charitable gift within the statute 43 Eliz. c. 4. A "religious society" does not mean a congregation of religious persons; it means, in an ordinary English will,

(1) 1 Mer. 55; 19 Ves. 483.
(2) 2 Dow. & C. 74.
(3) Law Rep. 6 Eq. 419.
(4) Ibid. 12 Eq. 574.
(5) 2 S. & S. 384.

a society which exists for religious purposes, a society which has religious objects, and is, therefore, clearly charitable. *Cocks* v. *Manners* (1) merely decided that a voluntary association of women for working out their own salvation by religious exercises and self-denial was not a "charitable" institution either in its popular or legal sense. It is clear from the authorities that a religious purpose is a charitable purpose: *Baker* v. *Sutton* (2); *Townsend* v. *Carus* (3); *Wilkinson* v. *Lindgren* (4). Though "benevolent" is insufficient, "religious" purposes do come within the statute. Here we have an indication of the testator's meaning sufficient to guide the Court.

Warmington, in reply:—

A "religious society" not being necessarily a society for "religious" purposes in the sense in which the word has been used in the authorities, it is not confined to charities, and, therefore, does not denote a general charitable purpose.

1892. Nov. 2. KEKEWICH, J.:—

On the first point made by the Solicitor-General—namely, that, if the will indicates a general intention to devote the residuary estate to charity, that intention will not be allowed to fail because the testator has omitted to express the particular objects—I have entertained no doubt. In favour of charities there is an established exception to the general rule that a definite gift must be made in order to defeat those who claim on an intestacy; and the general intention prevails, whatever be the incompleteness of detail. The authorities cited—take, for example, *Mills* v. *Farmer* (5) and *Pieschel* v. *Paris* (6)—support this proposition; and there are many others on the same lines.

What is the general intention indicated here? The argument for the Crown was based on a substitution for the words of the testator of other words said to be equivalent; but though it is by no means unfair or inconvenient to consider the meaning of language by the light of other language of a cognate character,

(1) Law Rep. 12 Eq. 574.
(2) 1 Keen, 224, 233.
(3) 3 Hare, 257.
(4) Law Rep. 5 Ch. 570.
(5) 1 Mer. 55.
(6) 2 S. & S. 384.

C. A.
1893
In re WHITE
WHITE *v.* WHITE.
Kekewich, J.

one must at last be driven to construe the particular words in question; and here one comes ultimately to this: Is a gift to "religious societies" necessarily a charitable gift in the technical sense of the word? Or, changing the phrase, are "religious societies" necessarily "charitable" in that sense? Undoubtedly, many religious societies are charitable. Perhaps it would not be too much to say that the large majority of them are; but if some are not—that is, if the term is or fairly can be applied to societies which are not charitable—then the intention of the testator to devote the residue to charity fails, and with it also the claim of the Crown.

There is no evidence before me respecting the constitution and objects of any religious societies, whether charitable or otherwise; and in such a matter it does not seem improper to rely on the common knowledge of mankind or on particular knowledge taught by personal experience. There is known to me a religious society, the object of which is defined to be "the encouragement and assistance of all who belong to it in leading a Christian life." Such a definition excludes any benefit to those who are not members of the society, which, therefore, cannot be charitable.

There are much larger and much better known societies, the objects of which are to assist their members, either young men or young women, in the struggle of life, which are closely connected with the Established Church and require the observance of religious duties as a condition of membership. Money given to any of these societies would be spent directly or indirectly for the benefit of the members, and could not otherwise be applied. There is no reason to doubt that there are—or at any rate there may be—like societies connected with the Dissenting body of which the testator was a minister. Societies of that character cannot be deemed charitable any more than the friendly society whose claim to the title was negatived by Vice-Chancellor *Hall* in *In re Clark's Trust* (1); and in truth they seem to fall directly within the ruling of Vice-Chancellor *Wickens* in *Cocks* v. *Manners* (2). The Vice-Chancellor's judgment is instructive on many points discussed in this case; but I will content myself

(1) 1 Ch. D. 497. (2) Law Rep. 12 Eq. 574.

with referring to the concluding sentences. He says (1) that money given to the convent there in question would be put into the common chest, and, when there, would be subject to no trust which would prevent the existing members of the convent from spending it as they pleased.

A society bound by no trust restraining such a result cannot, I think, be charitable; and, finding nothing in the words "religious societies" to restrict the objects of the testator's bounty to those who could not deal with their shares of it in that manner, I hold that there is no general intention to devote the residue to charity, such as the Court can execute or recognize; and that, as between the next of kin and the Crown, the former are entitled.

I understand that the question has been raised at the present time, that is, pending a tenancy for life and before the residue has become distributable, under an agreement that the Attorney General's costs shall be provided for. That provision must be made. I observe that the summons asks a declaration that certain persons may be declared entitled as next of kin, and that, if necessary, an inquiry respecting the next of kin may be directed. No objection occurs to me to a declaration in favour of specified persons, if the evidence is sufficient, or to an inquiry if it is not. The only question I have hitherto considered is whether the next of kin are, as I hold them to be, entitled as a class.

C. A.

The Crown appealed.

The appeal was heard on the 17th and 19th of December, 1892, and the 14th of January, 1893.

Sir *J. Rigby*, S.G., and *Ingle Joyce*, for the Crown:—

The learned judge has held that "religious societies" are not necessarily "charitable societies"; and that this will does not shew any general intention on the part of the testator to devote his residuary estate to charitable purposes. But it is established by a long line of authorities that "religious purposes" are, in the eye of the law, "charitable purposes": *Baker* v. *Sutton* (2); *Townsend* v. *Carus* (3); *Thornton* v. *Howe* (4);

(1) Law Rep. 12 Eq. 586.
(2) 1 Keen, 224.
(3) 3 Hare, 257.
(4) 31 Beav. 14.

C. A.
1893
In re WHITE.
WHITE v. WHITE.

Wilkinson v. *Lindgren* (1); and that in such a case as this, where, though particular "religious societies" are not mentioned, a general religious, *i.e.* charitable, purpose is sufficiently shewn, the Court will carry the testator's intention into effect, and direct a scheme to be settled: *Pieschel* v. *Paris* (2); *Tyssen* on Charitable Bequests (3); *Tudor* on Charitable Trusts (4).

"Benevolence" is not "charity" within the statute; and so a gift for such "benevolent, charitable, and religious purposes" as the trustees should think most beneficial has been held to be too wide and indefinite, because there the word "benevolent" was associated with "religious": *Williams* v. *Kershaw*, mentioned in *Baker* v. *Sutton* (5); and a society may be composed of religious people, and yet may not be a religious society. Again, the mere fact that the testator has called an object of his bounty a "religious" institution will not make it a charity, and an instance of this is *Cocks* v. *Manners* (6). That case was relied on as an authority against us in the Court below. But there the *ratio decidendi* that the gift to the Dominican convent was not a charitable gift was, that it was in effect a gift to private individuals, which they could use for their own benefit; so that it could not be said to be for charitable purposes. But where the benefits of the testator are intended, not for the individuals who compose the religious society, but for the religious purposes for which they are associated together, then the gift is a good charitable gift.

Warmington, Q.C., and *Edward Ford*, for the Respondent, one of the next-of-kin:—

What *Wickens*, V.C., said in *Cocks* v. *Manners* was that, in order to make a religious society a charitable society, its religion should be for the benefit of the public, and that if it is only a society for the development of religion amongst its own members, it is not a charitable institution. An example of this distinction is a prayer union, which is a real religious institution or society, but is certainly not a charitable institution. Another example

(1) Law Rep. 5 Ch. 570.
(2) 2 S. & S. 384.
(3) Page 194, *et seq.*
(4) 3rd Ed. p. 8.
(5) 1 Keen, 229.
(6) Law Rep. 12 Eq. 574.

is found in *Budget* v. *Hulford* (1), where the testator gave his residuary estate to be disposed of by his executors "in the manner they judge most effectual to promote true religion in the world in general, and the comfort of the servants of God in particular." There *Wickens*, V.C., held that the gift failed upon the ground that the gift was too indefinite. In the present case we contend that the testator had no full meaning present to his mind, but only an indefinite and incomplete intention.

Now, a gift to an unnamed charitable society is not enough, because of the possibility that if the testator had any particular charity in his mind, it might have been one which could not take the gift. It is merely an incomplete description, and the Court is not at liberty to guess at the testator's intention.

[Sir *J. Rigby* referred to *Attorney-General* v. *Syderfin* (2), and *Pocock* v. *Attorney-General* (3).]

In *Pocock* v. *Attorney-General*, it was held that the testator had shewn a clear intention to give to charitable institutions to be chosen by himself, and, in default, by his executors; and that, having got this clear charitable intention, when the testator failed to shew himself which particular charity he intended, the Court would direct a scheme. But that case is no authority here, nor is *Pieschel* v. *Paris* (4). The Court will not presume a charitable object, and when the object is indefinite the gift must fail: *Ewen* v. *Bannerman* (5); *Mayor of Gloucester* v. *Wood* (6); *Aston* v. *Wood* (7). Moral certainty is not enough. Where there is a blank, the Court must satisfy itself, as a matter of legal certainty, that no charity could have been intended which was incapable of taking; for the testator might have intended some charity which became extinct before the gift took effect.

Sir *J. Rigby*, in reply:—

In *Moggridge* v. *Thackwell* (8), Lord *Eldon* considered *Attorney-General* v. *Syderfin*, and came to the conclusion that it was a good authority. Besides *Pieschel* v. *Paris* and the other

(1) W. N. (1873) 175.
(2) 1 Vern. 224; 7 Ves. 43, n.
(3) 3 Ch. D. 342, 347.
(4) 2 S. & S. 384.
(5) 2 Dow. & C. 74.
(6) 3 Hare, 131; 1 H. L. C. 272, 277; *nom. Corporation of Gloucester* v. *Osborn*.
(7) Law Rep. 6 Eq. 419.
(8) 7 Ves. 36, 70.

C. A.
1893
In re WHITE. WHITE *v.* WHITE.

cases cited in the opening, *Loscombe* v. *Wintringham* (1), *Isaac* v. *De Friez* (2), and *Mills* v. *Farmer* (3), are also instances in which the Court has found a good charitable gift, although the precise objects of the testator's bounty are uncertain. In *Fisk* v. *Attorney-General* (4), *Wood*, V.C., held that a charitable purpose, when clearly indicated, should not be defeated, questioning *Clark* v. *Taylor* (5), which has recently been discussed and disapproved of in *In re Slevin* (6).

[BOWEN, L.J., referred to *Clephane* v. *Lord Provost of Edinburgh* (7), as to giving effect to a charitable intent where the particular object has failed.

LINDLEY, L.J.:—Vice-Chancellor *Wickens*, in *Cocks* v. *Manners* (8), seems in your favour; for he says: "It is said, in some of the cases, that religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public." From the great knowledge the Vice-Chancellor had of such cases, that is an important observation. Do you say that "religious societies" means religious societies tending to the instruction or edification of the public?]

Yes; I submit that the gift points to religious societies for the benefit of the public, and therefore charitable.

Budget v. *Hulford* (9) was the case of an alternative gift, one object being charitable and the other not; and it was on that ground that the whole gift was held to be bad.

In *Mayor of Gloucester* v. *Wood* (10) the gift was for a "purpose" not explained, and, therefore, not charitable. The Court was asked to guess that it was for a charitable purpose; but it was held that a mere guess at a charitable intention was not enough: there must be some positive indication. If the gift had been to a "public or charitable" purpose, that would have been sufficient. *Aston* v. *Wood* (11) was a similar case to that. "The

(1) 13 Beav. 87.
(2) 17 Ves. 373, n.
(3) 1 Mer. 55.
(4) Law Rep. 4 Eq. 521, 528.
(5) 1 Drew. 642.
(6) [1891] 2 Ch. 236.
(7) Law Rep. 1 H. L., Sc. 417, 421.
(8) Ibid. 12 Eq. 574, 585.
(9) W. N. (1873) 175.
(10) 3 Hare, 131; 1 H. L. C. 277.
(11) Law Rep. 6 Eq. 419.

case of one *Jones*," mentioned by Lord *Eldon*, in his judgment in *Mills* v. *Farmer* (1), as "not now to be found," is in "Cases in the House of Lords, 1664–1696" (2), forming part of Serjeant *Hill's* collection in *Lincoln's Inn* library (3). [He also cited *Liley* v. *Hey* (4).]

(1) 1 Mer. 101.

(2) Vol. i. pp. 175, 176.

(3) The following is a reprint of the entire case in the House of Lords, as it appears in Serjeant *Hill's* collection. The original is headed with the following date in MS., "20th Nov., 1690."

"The case of *Gayner Jones* widow, and *William Cross*, Gentleman, Defendants, To the information of Mr. Attorney General in His Majesties Court of Exchequer, upon an Appeal in the House of Lords, from two several Decrees made in Trinity Term, 1688. and Easter Term 1690.

anuary 1660. That *Robert Charnock* being seized in fee of divers lands in the county of *Lancaster*, by lease and release for 500*l.* paid by *Grace Bold* (sister of the said *Gayner Jones*), grants the same to one *Wolf* and his heirs, to the use of one *Manley* and the said *Charnock*, during their joint lives, and after to the said *Grace Bold* and her heirs; and both the said *Manley* and *Charnock* dyed Twenty years since, when *Grace Bold* entered and received the rents and profits, and levied a fine of the said lands, and for valuable consideration, both by deed and last will, granted and devised the premises to the said *Gayner Jones* for life, and after to the said *William Cross*, for raising of portions for *Gayner* and *Millicent* his daughters, with an allowance for maintenance of *John* and *William* his sons: Being the said *Grace's* sisters children; and after to the said *John Cross*, and the heirs males of his body, Remainder to the said *William Cross* in tail, with divers remainders over, and the said *Grace* in February 1685. dyed so seized, without any interruption for fifteen years, and after her death, the said petitioner *Gayner* entred and received the profits.

1686. The late King *James's* Attorney General exhibited an information against the petitioners, suggesting the said *Charnock* was a Priest in Orders of the Romish Religion, and did intend, notwithstanding the said deeds made to the said *Grace Bold*, that his estate should go, after his death, for his brethren the Priests of the Romish Religion in *England*; which being unlawful and superstitious, the same became forfeited to His said Majesty; but the prosecution was made by one Mr. *Gooden* a Romish Priest, who had some promise the same should be granted to the use of the Priests in *Lancashire*; and after several proofs taken, the Cause was heard on the 23d of June 1687. and a tryal directed on this issue, Whether the conveiances were made, declared or intended upon any Trust, and what trust? Which tryal being accordingly had, it was found the same were conveyed to the said *Grace Bold* in Trust, for the support of the Priests of the Secular Clergy of the Romish Religion in *Lancashire*, but eleven of the Jury were Papists, not quallifi'd by the law of the land to be Jury-

(4) 1 Hare, 580.

C. A.
1893
In re WHITE.
WHITE *v.* WHITE.

1893. Feb. 8. The judgment of the Court (*Lindley, Bowen,* and *A. L. Smith,* L.JJ.) was delivered by

LINDLEY, L.J. :—

This is an appeal from Mr. Justice *Kekewich* on the will of *Ebenezer White.* He was a Dissenting minister, and in the events

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men; and the Witnesses were also Papists; and in Trinity Term 1688. the said lands were decreed to His said Majesty, against the petitioners, and their heirs; and that they should bring into Court all the deeds and writings, before the end of next Michaelmas Term, and also deliver possession of the lands to His said Majesty, or whom he should appoint, and convey their right and title unto His said Majesty, and account for the rents and profits thereof.

That the petitioners exhibited their Bill of Review against his now Majesty's Attorney General, to set aside the said decree, which coming to be heard on his Answer, Plea and Demurrer thereto, the 21st of June last, in the said Court of Exchequer, the Decree is confirmed with this explanation or addition, That the premises are to be disposed of to such charitable and pious uses as their Majesties, their heirs, and successors shall think fit.

The petitioners have therefore brought their appeal before their Lordships against the said several decrees. For that the first decree ought not to have been made until there had been another tryal had upon the said Issue directed, in regard the said Verdict was ill obtained, and there was no ground for the said decree, no trust being sufficiently proved in *Grace Bold's* life time, who lived several years after the said *Charnock,* and peaceably enjoyed the same: And it is very hard and unreasonable, after so many years enjoyment, and such grants and wills made, to question the said estate, or inforce a positive proof of the payment of the purchase-moneys after so long time: and besides, no decree ought to have been without the said *John* and *William,* sons of the petitioner, *William Cross,* who are remainder men, or any deed to be delivered up without their being made parties; and the decree upon the Bill of Review is also erroneous. For that in all Bills of Review the Court either confirms or reverses the former decree, and never explains or amends the same, as in this case: For that upon a reversal the case is again to be re-heard, wherein the parties are at liberty to offer all their evidence again; and in that case might either have totally set aside the said decree, or obtain a new tryal, which by this explanation they are barred from: and this also is erroneous. For that if the same was to a superstitious use, it either ought to descend or be given to the next of relation, or the Court ought to appoint a Charity agreeable with the Protestant Religion: For which reason the first decree was also void, it being absolutely decreed to King *James,* without any direction of the Charity, and the Warrant pretended to be granted by his now Majesty to Trustees: For the benefit of the Vicar of *Leyland* in *Lancashire,* and his successors, will not, its hoped, make any alteration in the case, and take away the petitioners

which happened he left the whole of his property (subject to a life estate) "to the following religious societies, viz.* to be divided in equal shares among them." When the testator executed his will he left a blank for the names of the societies. After he had executed his will he put in their names; but they very properly do not appear in the probate, and the will must be construed as if the blank had never been filled up. Under these circumstances, Mr. Justice *Kekewich* held that there was an intestacy. From this decision the Attorney-General has appealed, upon the ground that the testator has bequeathed his property for charitable purposes, and that a scheme for its application ought to be directed. If the bequest in question amounts to, and ought to be construed as, a dedication by the testator of his property to charitable purposes, then there can be no doubt the Attorney-General is right. But the will says nothing in terms about charity, nor about the purposes for which the property is bequeathed. And it was urged by counsel for the next-of-kin that it was not possible to discover those purposes, except by guessing. A "religious" society may or may not be a "charitable" society, in the sense in which that expression is used. A society for the promotion of private prayer and devotion by its own members, and which has no wider scope, no public element, no purposes of general utility, would be a "religious" society, but not a "charitable" one: see *Cocks* v. *Manners* (1). In that case it was held that a gift by will to a Dominican convent was not a charitable gift. Vice-Chancellor *Wickens* said (2): "A voluntary association of women for the purpose of working out their own salvation by religious exercises and self-denial seems to me to have none of the requisites of a charitable institution, whether the word 'charitable' is used in its popular sense or in its legal sense." The words of the testator's will are insufficient to shew what

right by bestowing the estate upon a Charity."

At the foot of the case is the following MS. note: "1690 The Lords affirmed ye decrees and dismissed the Appeals." The case is noted up in the margin with the reference, "2 Vern. 266" (*Attorney-General* v. *Guise*), where it is mentioned as "*Gates and Jones's Case*," the title also given in *Cary* v. *Abbot* (7 Ves. 490, 491).

(1) Law Rep. 12 Eq. 574.

(2) Ibid. 585.

C. A.
1893
In re WHITE.
WHITE v. WHITE.

kind of religious societies he meant. They may, or may not, have been "charitable" as well as "religious," and, as all religious societies are not charitable, we should, in the absence of authority, be unable to come to the conclusion that "charity" was intended, and we should, therefore, be of opinion that the result was an intestacy.

It is, however, impossible, we think, seriously to deny that the testator intended his property to be given to some religious societies for religious purposes. His property was to be divided amongst certain societies; but what for? The only rational answer to this question must, we think, be "for the purposes of those societies;" and, the societies being themselves described as "religious societies," the purpose for which the testator gave his property must be treated as religious purposes. It is true that these are not necessarily "charitable" purposes, and in a particular case a "religious" society may be shewn not to be a "charitable" society. This was the case in *Cocks* v. *Manners* (1). But the authorities shew that a bequest to a religious institution, or for a religious purpose, is *primâ facie* a bequest for a "charitable" purpose, and that the law applicable to "charitable" bequests, as distinguished from the law applicable to ordinary bequests, ought to be applied to a bequest to a religious institution, or for a religious purpose. The leading cases on this head are as follows: *Baker* v. *Sutton* (1836) (2), where the bequest was to such religious and charitable institutions and purposes as in the opinion of the trustees might be fit and proper. Lord *Langdale*, M.R., in that case (3), said: "All the cases, with one exception, go to support the proposition, that a religious purpose is a charitable purpose." *Townsend* v. *Carus* (1843) (4) is to the same effect. Vice-Chancellor *Wigram* there said: "If this is a bequest for religious purposes, I think I am bound to hold it a charity within the decided cases." The promotion of the spiritual welfare of mankind was the object of the testator in that case (5), and the Vice-Chancellor dealt with the argument that some modes of promoting such welfare might not be

(1) Law Rep. 12 Eq. 574.
(2) 1 Keen, 224.
(3) 1 Keen, 233.
(4) 3 Hare, 257.
(5) 3 Hare, 261.

"charitable." Having come to the conclusion that the object of the testator was "charitable" because it was "religious," he says that no mode of carrying out his intention could be proper if that mode was not itself charitable. In *Wilkinson* v. *Lindgren* (1870) (1), where the bequest was to certain charitable institutions previously named, "or any other religious institution or purposes," as the trustees might think proper, religious purposes were treated as clearly "charitable."

We can find no authority which really conflicts with these, or which is opposed to the principle on which they proceed; and we cannot, without splitting straws, distinguish this case from them. We come, therefore, to the conclusion—first, that the gift is for religious purposes; and, secondly, that, being for religious purposes, it must be treated as a gift for "charitable" purposes, unless the contrary can be shewn. If once this conclusion is arrived at, the rest is plain. A charitable bequest never fails for uncertainty: *Mills* v. *Farmer* (2) settles that point. Lord *Eldon* (3) was clearly of opinion that the nomination of particular objects is only the mode and not the substance of a gift to "charity." We may add that, having looked at the Registrar's book for the will in *Attorney-General* v. *Syderfin*, we find that it is correctly set out in *Vesey* (4).

The decision appealed from must therefore be reversed, and it must be declared that, in the events which have happened, the testator's personal estate is subject to a trust for "charitable" purposes, and a scheme must be directed as to such part of it as was pure personalty at the testator's death. But, having regard to the blunder made by the testator and the real difficulty occasioned by him, the costs of all parties, both here and below, ought to come out of his estate, subject to the life interest of the tenant for life.

Solicitors: *Barfield & Child; Hare & Co.*

(1) Law Rep. 5 Ch. 570.
(2) 1 Mer. 55.
(3) 1 Mer. 101.
(4) 7 Ves. 43, n.

G. I. F. C.

C. A.
1892
ROMER, J.
Oct. 27; *Nov.* 3.
C. A.
1893
Jan. 31; *Feb.* 20.

FLINT *v.* HOWARD.

[1891 F. 911.]

Mortgage—Redemption—Two Properties—Subsequent Incumbrances—Priority—Marshalling—Apportionment.

P., in 1876, conveyed certain paper mills to *H.* by way of mortgage for securing £6000, and by deed of even date assigned a reversionary interest in personalty as collateral security for the same debt. In 1882 *P.* made a second mortgage of the paper mills and the reversion to the Plaintiff for £5000; and in 1884 *P.* made a third mortgage of the paper mills only to the Plaintiff for £2500. In 1885 a deed was executed whereby the Plaintiff transferred his mortgage for £2500 to *H.*, and released the paper mills from his mortgage for £5000; so that *H.* became first and second mortgagee of the paper mills, as well as first mortgagee of the reversion, and the Plaintiff second mortgagee of the reversion. *P.* made subsequent mortgages both of the paper mills and the reversion. The Plaintiff foreclosed the mortgages on the reversion which were subsequent to his own, and then brought an action claiming to redeem *H.*'s mortgage on the reversion on payment of £6000, and to have a transfer from him of his first mortgage on the paper mills, as a security for what he had paid:—

Held (affirming the decision of *Romer*, J.), that the Plaintiff was entitled to redeem the reversion and paper mills on payment of the £6000 to *H.*; that the sum paid by him must be apportioned between the paper mills and the reversion, according to their respective values; and that the Plaintiff was entitled to have a conveyance of the reversion absolutely, and of the paper mills to be held as security for such part of the money paid as should be apportioned to that property:

Held, also, that upon the true construction of the deed of 1885, the release by the Plaintiff of his charge on the paper mills did not affect his right to a transfer of *H.*'s first mortgage on that property in the events which had happened.

Barnes v. *Racster* (1) followed.

By an indenture dated the 18th of August, 1876, *Filmer Phipps* mortgaged his reversionary interest in a sum of £10,000, subject to the life interest of *Jane Phipps*, called in the pleadings the Reversion, to the trustees of a settlement, called in the pleadings *Tucker's* trustees, for securing the repayment of £4000 and interest. This mortgage ultimately became vested in the Defendants *A. Bradley*, *S. Bradley*, and *G. Hart*. *Jane Phipps*

(1) 1 Y. & C. Ch. 401.

died in 1889, and the debt was paid off out of the sum of £10,000, and about £5000, the remainder of the £10,000, was paid into Court.

By an indenture dated the 26th of October, 1876, *Filmer Phipps* mortgaged certain freehold paper mills and other property called in the pleadings the Paper Mills, to *W. Howard* for securing the repayment of £6000 and interest. By another indenture of even date he assigned the reversion to *W. Howard* as collateral security for the same sum of £6000; but subject to the said mortgage for £4000.

By an indenture dated the 15th of May, 1882, *Filmer Phipps* mortgaged both the paper mills and the reversion, together with other property, to the Plaintiff, *Frederick Flint*, for securing the repayment of £5000 and interest, but subject to the said prior mortgages.

By an indenture dated the 30th of April, 1884, *Filmer Phipps* mortgaged the paper mills only to the Plaintiff for a further sum of £2500 and interest, subject nevertheless to the first mentioned indenture of mortgage of the 26th of October, 1876.

By an indenture dated the 3rd of February, 1885, *Filmer Phipps* mortgaged the reversion and the paper mills to *E. M. E. Munns* for securing the repayment of £1700 and interest; but subject to the said several indentures of mortgage.

By an indenture dated the 30th of October, 1885, and made between the Plaintiff of the first part, *Phipps* of the second part, and *Howard* of the third part, after reciting among other things the above mentioned indentures of mortgage, except the mortgage of the 3rd of February, 1885, and reciting that *Howard* had agreed at the request of *Phipps* to pay to the Plaintiff the sum of £2500 on having a transfer of the mortgage of the 30th of April, 1884, and to lend to *Phipps* a further sum of £4000 on having the repayment thereof, as well as of the said sum of £2500 with interest for the same mortgage, secured in manner thereinafter expressed; and that the Plaintiff had agreed at the request of *Phipps* to release the paper mills from the mortgage deed of the 15th of May, 1882, and the payment of the sum of £5000 thereby secured, it was witnessed that the Plaintiff as mortgagee assigned to *Howard* the principal sum

C. A.
1893
FLINT
v.
HOWARD.

of £2500 secured by the indenture of the 30th of April, 1884; and *Phipps* covenanted to pay to *Howard* the sum of £6500 with interest at the rate of £7 per cent. And by the same indenture the Plaintiff as mortgagee, and *Phipps* as beneficial owner, conveyed the paper mills to *Howard* discharged from all principal money and interest claims or demands under the mortgage deed of the 15th of May, 1882, and from all equity of redemption under the mortgage deed of the 30th of April, 1884; but subject to a fresh proviso thereinafter contained for the redemption of the premises on payment of the sum of £6500 and interest. And by the same indenture *Phipps* conveyed the reversion to *Howard* by way of mortgage, subject to the same proviso for redemption, and subject to the prior incumbrances affecting the same.

By an indenture dated the 15th of December, 1885, *E. M. E. Munns* transferred the mortgage for £1700 created by the indenture of the 3rd of February, 1885, to the Defendants *F. G. Munns* and *C. J. Hoseason.*

By another indenture dated the 21st of December, 1885, *Phipps* mortgaged the paper mills alone to *Rest William Flint* for £2500, subject nevertheless to the prior incumbrances affecting the same. *R. W. Flint* died in September, 1888, and the Defendant *M. Flint* was his personal representative. *W. Howard* died in June, 1888, leaving the Defendant *John Howard* his executor.

In September, 1888, proceedings in bankruptcy were commenced against *Phipps*; but he subsequently made an arrangement with his creditors under which the bankruptcy was annulled, and his equity of redemption in the paper mills and reversion was assigned to the Defendants *Robinson* and *Fisher* for their benefit.

In November, 1889, the Plaintiff commenced an action in the Chancery Division (*Flint* v. *Munns*) against the same Defendants as were Defendants to the present action, claiming an account of what was due to him under the mortgage of the 15th of May, 1882, and in default for foreclosure.

In the action he obtained judgment on the 11th of February, 1890, against the Defendants for payment of what was due for principal and interest on his mortgage debt, and in default for

foreclosure of the reversion. But the order was made without prejudice to any question which might arise as to the rights of the Defendants as between themselves in the premises; and ultimately on the 1st of November, 1890, he obtained an order for foreclosure absolute.

In May, 1890, the Defendants, *F. G. Munns* and *C. J. Hoseason* brought an action (*Munns* v. *Howard*) claiming payment or foreclosure in respect of their mortgage of the 3rd of February, 1885, and by the judgment given on the 27th of October, 1891, accounts were directed of what was due to *John Howard* on the mortgages of the 26th of October, 1876, and 30th of April, 1884, and in the event of redemption by *Munns* and *Hoseason*, such mortgages are directed to be transferred to them, but without prejudice to the rights of the Plaintiff *F. Flint* as the owner of the equity of redemption in the reversions under his foreclosure, and the usual foreclosure order was made subject to the Plaintiff's rights as aforesaid; but in default of redemption by *Munns* and *Hoseason* the action was to be dismissed. The time for redemption was enlarged, and had not expired at the date of the trial of the present action.

The present action was brought by the Plaintiff, *F. Flint*, against the persons interested in the various mortgages, claiming a right to redeem *Howard's* mortgages of the 26th of October, 1876, on paying off the £6000 secured thereby, and to obtain from him an assignment of his mortgage, as to the reversion absolutely, and as to the paper mills as a security for the sum paid by him; or in the alternative that it might be declared that the debt secured by the mortgage of the 26th of October, 1876, ought to be borne proportionally by the two properties.

The action was heard before Mr. Justice *Romer* on the 27th of October, 1892.

Haldane, Q.C., and *Micklem*, for the Plaintiff :—

The Plaintiff is entitled to redeem the mortgage of October, 1876, in priority to any one else. The case is governed by the principle of *Mutual Life Assurance Society* v. *Langley* (1). The deed of the 30th of October, 1885, in no way prejudiced his

(1) 32 Ch. D. 460.

C. A.
1893
FLINT
v.
HOWARD.

rights or his position. The effect of it was to take the paper mills out of the first mortgage altogether, and to leave the reversionary interest untouched.

Neville, Q.C., and *A. Young*, for the Defendant *Howard*:—

Mutual Life Assurance Society v. *Langley* (1) does not apply. There it was held that a mortgagor alone could not alter the priorities of his mortgagees. But here the Plaintiff, a mortgagee, was a party to the deed of October, 1885, and expressly released the paper mills and altered his position. He thereby abdicated his position of mortgagee of the paper mills. If his contention is right, his position now is the same as it was before he executed that deed, and yet we advanced our money on the faith of his release.

Chadwyck Healey, Q.C., and *Wurtzburg*, for the Defendants *Munns* and *Hoseason*, argued to the same effect. They further contended that as they had obtained judgment for foreclosure in their action of *Munns* v. *Howard* they were entitled to priority over the Plaintiff: *Powell* on Mortgages (2).

J. R. Brooke, for the Defendants, *Robinson* and *Fisher*:—

The mortgage debt ought to be apportioned between the paper mills and reversionary interest according to the relative values of those properties: *Barnes* v. *Racster* (3).

Haldane, in reply.

1892. Nov. 3. ROMER, J.:—

It is clear from the case of *Mutual Life Assurance Society* v. *Langley*, that the Plaintiff, as mortgagee of the reversionary interest under the deed of the 15th of May, 1882, is entitled to redeem the mortgage of the 26th of October, 1876, which covers both the reversionary interest and the paper mills, and to redeem it in respect of both the properties unless that right has been lost to the Plaintiff by what has taken place subsequently to the mortgage of the 15th of May, 1882.

In the first place, it is said that the right has been lost by the

(1) 32 Ch. D. 460. (2) 6th Ed. vol. i. p. 262.
(3) 1 Y. & C. Ch. 401.

Plaintiff having been party to the deed of the 30th of October, 1885. But notwithstanding the wording of the operative part of that deed to which the Plaintiff was a party, I am of opinion, looking to the recitals and the general tenor of the deed, that its intention and effect so far as concerns the mortgage of the 15th of May, 1882, was only to free that mortgage from the charge it created on the paper mills, and not in any way to prejudice or affect the rights of the Plaintiff as continuing mortgagee of the reversionary interest, even though those rights included the right to redeem the prior mortgage of the 26th of October, 1876, in respect of both properties. It is said, and no doubt with considerable force, that inasmuch as one of the objects of the deed of the 30th of October, 1885, was to place *Howard* in the position of first and second mortgagee of the paper mills, freed from the intervening mortgage of the 15th of May, 1882, it is not probable that the parties could have contemplated that immediately afterwards the Plaintiff, as continuing mortgagee of the reversionary interest, would, or would be able to, redeem the prior mortgage in respect of both properties. But probably the parties did not consider that question at all. And certainly if it had been intended as part of the contract embodied in the deed of the 30th of October, 1885, that the Plaintiff should lose any of his rights as continuing mortgagee of the reversionary interest, I think that ought to have clearly appeared, and to have been distinctly provided for by that deed. And in considering what the parties probably contemplated when they executed that deed, the Plaintiff might well retort on *Howard* that they could not have contemplated that, if the Plaintiff as mortgagee of the reversionary interest was obliged to redeem the said mortgage, he should have been obliged to pay off the first mortgage debt charged on both properties, and throw the whole of that debt exclusively on the reversionary interest.

It is then said that in some way the Plaintiff's rights of redemption have been lost or affected because in his foreclosure action he has foreclosed the mortgagor, and all the subsequent mortgagees on the reversionary interest. I think this is unfounded, and that his right of redemption remains, though what his position will be after he has redeemed will have to be

C. A.
1893
FLINT
v.
HOWARD.
Romer, J.

considered by me in a moment. Nor do I think that the Plaintiff is not entitled to redeem without reopening his foreclosure decree. Next it was said that, because the reversionary interest has become an interest in possession and the trustees of that interest have paid the fund into Court in this action, the Plaintiff's rights of redemption are thereby affected. I think this is not so. The first mortgagee has never received the fund, nor has any part of it been applied in paying off any part of the first mortgage debt. Until he received the fund his right to bring an action to foreclose could not, I think, have been challenged, and the right of redemption must have been co-existing with the right to foreclose. Lastly, it was said that the judgment in the redemption action brought by the subsequent mortgagees, *Munns* and *Hoseason*, had given them prior rights which the present Plaintiff cannot now displace; and a passage from a text-book was cited to the effect that where several people have a right to redeem priority is acquired by the one who first brings an action or obtains a judgment for redemption. No authority was cited for this general proposition, and I am not aware of any, and I dissent from the proposition unless it be limited (as the writer of the text-book probably intended) to the case where the parties entitled to redeem have *inter se* equal rights. Where these rights are not equal, then if one redeems who has not the first right he would take subject to the prior rights of the others, and the conveyance to him ought to be subject to and to reserve such prior rights as was pointed out by Lord *Hatherley* in the case of *Pearce* v. *Morris* (1).

In the case before me, as between the Plaintiff on the one hand and *Munns* and *Hoseason* on the other, the Plaintiff had a prior right of redemption, as is shewn by the case of *Mutual Life Assurance Society* v. *Langley* (2), and the judgment for redemption obtained by *Munns* and *Hoseason* was made expressly subject to the Plaintiff's right. I am not sure that I ought not in that action to have decided the claim which the Plaintiff makes in this action, and which he then raised before me; but even if this be so, fortunately no harm has been done by my not deciding it then, as the judgment I then gave was made in a form which

(1) Law Rep. 5 Ch. 227, 230-31. (2) 32 Ch. D. 460.

did not prejudice the Plaintiff's rights whatever they were, and allows me now to determine those rights in this action. It follows that the Plaintiff is, in my judgment, entitled to redeem the first mortgage as to both properties on payment of what is due on that first mortgage.

But then comes a question which has been raised and argued, and which I am satisfied I ought to decide in this action. When the Plaintiff has redeemed, what position will he then stand in with reference to the rights of redemption of the subsequent mortgagees of the paper mills? Clearly inasmuch as the Plaintiff is absolute owner of, and no longer mortgagee of, the reversionary interest (now represented by the fund in Court) he cannot be redeemed in respect of that property. And, as this is so, the Plaintiff contends that if the subsequent mortgagees of the paper mills redeem that property they must pay him off the whole of what he paid the first mortgagee, without any apportionment as between that property and the fund in Court. I think this contention unjust to the parties, and untenable. In my judgment, there must be an apportionment according to the values of the two properties. I know of no authority precisely in point, but that apportionment is the proper principle to be applied in cases of this kind appears from several authorities where apportionment has been directed, in somewhat analogous, though not precisely similar cases: as for instance in *Barnes* v. *Racster* (1), and *Bugden* v. *Bignold* (2). The form of the judgment requires care.

The judgment was drawn up as follows:—

This Court doth declare that, notwithstanding the judgment, dated the 27th of October, 1891, in the action of *Munns* v. *Howard* (1890 M. 1474), the Plaintiff is entitled to redeem the securities comprised in the two several mortgages of the 26th of October, 1876, in the pleadings mentioned, being the properties in the statement of claim in this action referred to as the paper mills and reversionary interest. And this Court doth order and adjudge that an account be taken of what is due to the Defendant *J. Howard*, under and by virtue of the last-mentioned mortgages, and for his costs of this action, so far as relates to such mortgages, such costs to be taxed by the Taxing Master, and the total amount due to the Defendant, *J. Howard*, is to be certified. And it

(1) 1 Y. & C. Ch. 401. (2) 2 Y. & C. Ch. 377.

C. A.
1893
FLINT
v.
HOWARD.

is ordered that upon the Plaintiff paying to the Defendant, *J. Howard*, what shall be certified to be due to him as aforesaid within six calendar months after the date of the Chief Clerk's certificate, at such time and place as shall be thereby appointed, the Defendant, *J. Howard*, do execute all proper instruments for conveying and assigning to the Plaintiff, *F. Flint*, the paper mills and reversionary interest comprised in the said mortgage securities of the 26th of October, 1876, subject as to the paper mills to such equity of redemption as may be then subsisting in any person or persons free and clear from all incumbrances done by the Defendant, *J. Howard*, or his testator, *W. Howard*, in the pleadings mentioned, or any person or persons claiming by from or under them or either of them and as to the reversionary interest absolutely, and that the Defendant, *J. Howard*, do deliver up on oath (if required) to the Plaintiff, all the title deeds and mortgages in his custody or power relating to the paper mills and the reversionary interest except subsequent mortgages, such conveyance and assignment to be settled by the Judge, in case the parties differ. And, thereupon, it is ordered that the—Consols and—cash respectively in Court to the credit of this action: *Flint* v. *Howard* (1891 F. 911), and any accumulations of interest (hereinafter called the funds in Court) representing the balance of the reversionary interest be transferred and paid to the Plaintiff *F. Flint*. And it is ordered that in that case the said Plaintiff be at liberty to apply for such transfer and payment out as he may be advised. But in case the Plaintiff shall fail to pay to the Defendant, *J. Howard*, what shall be certified to be due to him as aforesaid, within the time and at the place aforesaid, it is ordered that this action do stand dismissed out of this Court, with costs against the Defendants, *J. Howard*, *F. G. Munns*, *C. J. Hoseason*, *M. Flint*, *Robinson & Fisher*, and *F. Phipps*, such costs to be taxed, &c. And in that case it is ordered that the said funds in Court be carried over to the credit of the said action, *Munns* v. *Howard* (1890 M. 1474). And in that case it is ordered that any of the parties claiming to be interested in the funds in Court be at liberty to apply for such carrying over, as he or they may be advised.

But in case the Plaintiff shall pay to the Defendant, *J. Howard*, what shall be certified to be due to him as aforesaid, within the time and at the place aforesaid: It is ordered that an inquiry be made what proportion of the amount so paid by the Plaintiff, and of his costs of this action, such costs to be taxed by the Taxing Master, ought to be borne by the said funds in Court and the paper mills respectively, having regard to the respective values thereof at the date of such payment. And the Court doth declare that the Plaintiff is entitled to hold the paper mills as security for the proportion of the amount so paid by him as aforesaid, and of his costs of this action which shall be found upon such inquiry to be the proportion which ought to be borne by the paper mills. And it is ordered that the subsequent interest be computed on the proportion of the amount so paid by the Plaintiff as aforesaid, which shall be found upon the inquiry hereinbefore directed to be the proportion which ought to be borne by the paper mills at the rate of £5 per cent. per annum from the date of such payment. And it is ordered that the total amount be certified, for which the Plaintiff will be entitled to hold the paper mills as security, in respect of the proportion of the amount paid by the Plaintiff to the Defendant, *J. Howard*, and of the taxed costs of the Plaintiff of this action, which upon

such inquiry shall be found to be the proportion which ought to be borne by the paper mills, and in respect of subsequent interest to be computed as aforesaid. And upon the Defendants, *J. Howard*, *F. G. Munns*, *C. J. Hoseason*, *M. Flint*, and *Robinson & Fisher*, or any of them, paying to the Plaintiff the amount which shall be certified as last aforesaid, within six months after the date of the Chief Clerk's certificate, at such time and place as shall be thereby appointed. It is ordered that the Plaintiff do execute all proper instruments for conveying the paper mills to the Defendants or Defendant, so redeeming free and clear from all incumbrances done by the Plaintiff or any person or persons claiming by from or under him, but subject to such equity of redemption as may be subsisting therein in any other person or persons, and do deliver up on oath if required, all the title deeds and mortgages in his custody or power relating to the paper mills, to the Defendants or Defendant, so redeeming such conveyance to be settled by the Judge in case the parties differ. And it is ordered that the Defendants or Defendant so redeeming the Plaintiff as aforesaid, be at liberty to apply to the Court as they or he may be advised as to adding further accounts and inquiries, and generally and on such application, it is not to be incumbent on the Defendants or Defendant so applying to give notice to the Plaintiff of such application. But in default of the said Defendants, or any of them, so redeeming the Plaintiff as aforesaid: It is ordered that the Defendants so failing to redeem the Plaintiff, do stand absolutely debarred and foreclosed of, and from all right, title, interest, and equity of redemption in the paper mills, and every part thereof. And it is ordered that the Defendants, *J. Howard*, *F. G. Munns*, *C. J. Hoseason*, *M. Flint*, and *Robinson & Fisher*, be at liberty to add to their respective securities, their costs of this action so far as such costs shall not be paid by the Plaintiff, in the event of his failing to redeem under this order, or so far as such costs are not otherwise provided for by this order. And it is ordered that the Plaintiff and the Defendants, *J. Howard*, *F. G. Munns*, *C. J. Hoseason*, *M. Flint*, and *Robinson & Fisher*, and *F. Phipps*, be at liberty to adopt any of the proceedings and accounts in the said action of *Munns* v. *Howard* (1890 M. 1474) as they may be advised. And it is ordered that the time fixed for redemption by the Plaintiffs in the said action of *Munns* v. *Howard*, be extended until it shall be seen whether or not the Plaintiff in this action will redeem under this order. And any of the parties are to be at liberty to apply as they may be advised.

H. L. F.

C. A.

From this judgment the Defendant *Howard* appealed. The appeal was heard on the 31st of January, 1893.

Neville, Q.C., and *A. Young*, for the Appellant:—

By our appeal we claim that the Plaintiff *Flint* is not entitled to redeem the reversion without paying to the Appellant the amount due on the collateral security of the 26th of October, 1876, which only includes the reversion, and is not entitled to

C. A.
1893
FLINT
v.
HOWARD.

redeem the paper mills at all; or, in the alternative, that the Plaintiff is not entitled as against the Appellant, to redeem the paper mills, except on the payment of all which is due to the Appellant, on all his mortgages on the paper mills, including what he may pay to the Defendants *Munns* and *Hoseason*, under the judgment in *Munns* v. *Howard*.

Independently of the deed of the 30th of October, 1885, we contend that the Plaintiff would have no right to hold the first mortgage of the paper mills in such a way as to prejudice the rights of the subsequent mortgagees on the property. But the question is concluded by the effect of the deed, by which the Plaintiff released the paper mills from the mortgage deed of £5000 in order that the Appellant might have the first charge on them. If the judgment appealed from is correct, the Plaintiff stands in the same position as if that deed had not been executed.

Chadwyck Healey, Q.C., and *Wurtzburg*, for the Defendants *Munns* and *Hoseason*, supported the appeal.

Haldane, Q.C., and *Micklem*, for the Plaintiff:—

If it was not for the deed of October, 1885, the right of the Plaintiff to hold the paper mills till his debt was fully satisfied would not be disputed. It was never intended by that deed to place him in a worse position than if he had never had any charge on the paper mills for his debt of £5000. He only released the paper mills from his charge in respect of that sum; it was not intended to affect any rights which he might acquire by redeeming the Appellant's first mortgage. If the Appellant's contention succeeds he will throw the whole of the £6000 on the reversion which was only intended as a collateral security. We are satisfied with the apportionment directed by the judgment, which is in accordance with *Barnes* v. *Racster* (1).

J. R. Brooke, for the Defendants *Robinson* and *Fisher*.

Swinfen Eady, for the Defendants *Bradley* and *Hart*.

A. Young, in reply.

(1) 1 Y. & C. Ch. 401.

1893. Feb. 20. LINDLEY, L.J.:—

This is an appeal by the Defendant from a decision of Mr. Justice *Romer* in an action for redemption.

The facts, so far as they are material, are as follows. A person of the name of *Phipps* was the owner of two properties referred to in the argument as the paper mills and the reversion. He raised money by mortgaging these properties, and on the 30th of October, 1885, the incumbrances upon them were as follows: first, there was a mortgage for £6000 on both properties in favour of *Howard*; secondly, there was a mortgage for £5000 on both properties, and on other properties also, in favour of the Plaintiff, *Frederick Flint*; thirdly, there was a mortgage for £2500 on the paper mills in favour of the Plaintiff, *F. Flint*; fourthly, there was a mortgage for £1700 on both properties in favour of *Munns*.

On the 30th of October, 1885, a deed was executed between the Plaintiff, *Frederick Flint*, of the first part; *Phipps*, of the second part, and *Howard*, of the third part; and by this deed (to which *Munns* was not a party) several important changes were made in the respective positions of the Plaintiff and *Howard*. 1. The Plaintiff, *F. Flint*, transferred his mortgage debt for £2500 on the paper mills to *Howard*. 2. The Plaintiff, *F. Flint*, released the paper mills from his mortgage for £5000; and 3. *Howard* made *Phipps* a further advance of £4000 on the security of the paper mills, and *Phipps* charged both the paper mills and the reversion in favour of *Howard* with £6500, by inserting in the deed a covenant to pay that sum and a proviso for the redemption of both properties upon payment thereof.

In December, 1885, *Phipps* mortgaged the paper mills alone to *Rest William Flint* for £2500. In 1888 *Phipps* assigned his equity of redemption for the benefit of his creditors.

The incumbrances on the two properties then stood as follows: 1. a charge of £6000 on both properties in favour of *Howard*; 2. a charge of £5000 on the reversion in favour of *F. Flint*, the Plaintiff, who had notice of the first mortgage; 3. a charge of £2500 on the paper mills in favour of *Howard*, who had notice of the second mortgage; 4. a charge of £1700 on both properties in favour of *Munns*; 5. a charge of £6500 on both properties in

C. A.
1893
FLINT
v.
HOWARD.
Lindley, L.J.

favour of *Howard*; 6. a charge of £2500 on the paper mills in favour of *R. W. Flint*.

The following tabular statement will make the position plain.

On the Paper Mills.	On the Reversion.
1. £6000, *Howard's*.	1. £6000, *Howard's*.
	2. £5000, *F. Flint*, the Plaintiff's.
3. £2500, *Howard's*.	
4. £1700, *Munns'*.	4. £1700, *Munns'*.
5. £6500, *Howard's*.	5. £6500, *Howard's*.
6. £2500, *R. W. Flint's*.	

The mortgages to *Howard* for £6000 were for one and the same sum; and the mortgages to him for £6500 were also for one and the same sum, which included the £2500 (No. 3). The mortgages to *Munns* for £1700 were also for one and the same sum. The numbers denote the order of date of the various charges.

In 1889 the Plaintiff brought an action to foreclose *Munns*, and the persons interested in the equity of redemption of the reversion, and in November, 1890, the Plaintiff obtained an order absolute for foreclosure, and he thus became owner of the reversion, subject, however, to *Howard's* mortgage for £6000. This order, however, was made without prejudice to the rights of the Defendants among themselves. The present action is brought by the Plaintiff, *F. Flint*, to redeem *Howard* by paying him off his £6000 and interest, aud to obtain from him an assignment of his mortgage on the paper mills for that sum. The Defendant *Howard* resists this, and contends that the deed of the 30th of October, 1885, is inconsistent with any such right of redemption and assignment, inasmuch as the effect will be to give the Plaintiff a charge on the paper mills in priority to *Howard's* charges upon them contrary, as *Howard* contends, to the arrangement come to between the parties, and carried out by the deed in question.

Mr. Justice *Romer* has decided this controversy in favour of the Plaintiff, and has pronounced a judgment, declaring and giving effect to the rights of the parties. The judgment is shortly to this effect: it declares that the Plaintiff is entitled

to redeem *Howard's* mortgage on the paper mills and reversion on payment of the £6000 and interest and costs; it directs an account of what is due to *Howard* in respect of that mortgage, and directs that on payment of what is so due, *Howard* shall assign the paper mills and reversion to the Plaintiff, subject as to the paper mills to all equities of redemption, and as to the reversion absolutely. In default of payment the Plaintiff is foreclosed in the usual way. The judgment then goes on to direct that on payment by the Plaintiff of what is due to *Howard* in respect of the £6000 mortgage, the Plaintiff will be entitled to hold the paper mills as a security for so much of the £6000 and interest and costs, as is proportionate to their value, relatively to the value of the reversion, and an inquiry is directed in order to ascertain this proportion. The judgment further goes on to direct that upon payment of the amount due to the Plaintiff on this footing, he shall convey to *Howard* subject to all rights of redemption, and that in default, *Howard* shall be foreclosed.

From this judgment, *Howard* appeals. The Plaintiff is content with it. He does not seek on redeeming *Howard* to have a first charge on the paper mills for the whole £6000 and interest, nor to tack his £5000 to it, and so stand as the first incumbrancer on the paper mills for £11,000.

Subject to any provisions to the contrary which may be found in the deed of the 30th of October, 1885, the Plaintiff *Flint* as second mortgagee of the reversion, would clearly be entitled to redeem *Howard's* first mortgage on the same property upon paying him off the amount due to him in respect of the £6000 and interest; and upon such payment the Plaintiff *Flint* would be entitled to an assignment of all the securities held by *Howard* for the same £6000. In other words the Plaintiff *Flint* would be entitled to an assignment of *Howard's* mortgage on the paper mills for the same £6000. The existence of subsequent mortgages on the paper mills, whether to *Howard* or to third parties, would not affect the Plaintiff *Flint's* rights in this respect. *Howard* would have no right to tack his second or later incumbrances on the paper mills to his mortgage for £6000 on them and the reversion, and compel the Plaintiff to pay him more than £6000 and interest, in order to redeem the reversion.

C. A.
1893
FLINT
v.
HOWARD.
Lindley, L.J.

This point was settled by *Mutual Life Assurance Company* v. *Langley* (1). Unless, therefore, the deed of the 30th of October, 1885, has varied the rights of the parties in this respect, the first part of Mr. Justice *Romer's* judgment declaring the Plaintiff entitled to redeem *Howard*, and to stand in his place in respect of the £6000 is correct.

The next thing to ascertain is the consequences which follow from this conclusion. Let us assume that the Plaintiff *Flint* has redeemed *Howard's* first mortgage for £6000, and has obtained an assignment of that mortgage or a conveyance of the paper mills subject to redemption. *Howard* as second mortgagee of the same property, would in his turn have a right to redeem the Plaintiff; but on what terms? Three only can be suggested, viz., (1.) on payment of £6000 and interest; (2.) on payment of £11,000 and interest; (3.) on payment of a proportionate part of the £6000 and interest, according to the value of the paper mills property relatively to that of the reversion. Of these three possible terms on which alone *Howard* could redeem the Plaintiff in the event now supposed, the judgment appealed from by *Howard* has adopted the most favourable to him, and the Plaintiff does not complain. But let us look at the matter a little further. If the Plaintiff on redeeming the £6000 could stand as first mortgagee on the paper mills for that sum, and if *Howard* could redeem him in his turn by paying him off the same sum, *Howard* would then be what he was before, viz., first mortgagee of both properties for £6000, liable to be again redeemed by the Plaintiff on the same terms as before, and there would be a perpetual see-saw, each in turn redeeming the other, as soon as the other redeemed him. This is absurd, and cannot therefore be right. Next, if the Plaintiff's charge of £5000 were still subsisting, that is, if the Plaintiff had not by foreclosing become the owner of the reversion, free from all incumbrances except *Howard's* £6000, a question would arise whether the Plaintiff *Flint* would be entitled upon redeeming *Howard* to tack his £5000 to the £6000, and to insist on being paid both sums by *Howard*, if he as second mortgagee of the paper mills sought in his turn to redeem the Plaintiff; for the

(1) 32 Ch. D. 460.

£5000 mortgage on the reversion was prior in point of date to his second mortgage on the paper mills, and he had notice of this fact. But it is unnecessary to consider what the exact rights of the parties would have been in the events supposed; both because the £5000 is no longer a subsisting charge, and because the judgment does not impose upon *Howard* the obligation of paying the £5000, or any part of it, in the event of his redeeming the Plaintiff, when he has become first mortgagee of the paper mills.

In apportioning the £6000 between the two properties in the event of *Howard* seeking to redeem the Plaintiff after he has become first mortgagee, the learned judge has applied to this case the principle of *Barnes* v. *Racster* (1) and *Bugden* v. *Bignold* (2), and it is difficult to see what other course could be adopted. The £5000 being no longer a subsisting charge, and the Plaintiff's right to redeem the £6000 being incontestable, I see no other way of avoiding the absurdity of perpetual recurring redemptions to which I have already alluded.

For these reasons I am of opinion that unless the judgment appealed from is inconsistent with the deed of the 30th of October, 1885, the appeal must fail. I proceed to consider this deed.

[His Lordship then referred to the terms of the deed before set forth, and continued:—]

I was at one time much impressed by the arguments of the Appellant's counsel to the effect that this deed was inconsistent with the Plaintiff's right to any charge on the paper mills in priority to *Howard*. But upon reflection, I have come to the conclusion that those arguments ought not to prevail. I certainly think that it would be quite inconsistent with that deed to allow the Plaintiff, when he had redeemed the reversion by paying off the £6000, to tack his £5000 to the £6000, and compel *Howard* to pay him £11,000 as the price of redeeming the paper mills. But the Plaintiff does not contend for any such right, nor does the judgment give it him. The right of the Plaintiff to redeem the reversion on paying off *Howard* his £6000 cannot be denied. Is, then, the Plaintiff to have no rights at all

(1) 1 Y. & C. Ch. 401. (2) 2 Y. & C. Ch. 377.

C. A.
1893
FLINT
v.
HOWARD.
Lindley, L.J.

against the paper mills on paying off that £6000? I cannot read the deed of the 30th of October, 1885, as going so far as that. It was contended for *Howard* that *Howard* paid the Plaintiff £2500 and advanced *Phipps* a further sum of £4000, and that the Plaintiff released the paper mills from his mortgage for £5000, solely in order that as between the parties to the deed *Howard* might become mortgagee of the paper mills for one aggregate sum of £12,500. I think this is true. But then *Howard* did not release the reversion from his £6000, nor did the Plaintiff release his right to redeem the first charge upon it. The truth is that the effect of such redemption was overlooked and not provided ag inst. The true result of the deed is that the Plaintiff, in ad ition to transferring his mortgage for £2500 to *Howard*, simply released the paper mills from his second mortgage of £5000 and gave up the right of charging that sum upon the paper mills, and also all possible right of tacking that sum to the £6000 as against the paper mills, even if by redeeming the first mortgage for £6000 he might become the first incumbrancer upon them. I think the deed went as far as that, but no further.

The judgment appealed from is therefore, in my opinion, correct, and the appeal must be dismissed with costs.

KAY, L.J.:—

The principal question argued on this appeal has been as to the effect in the events which have happened of a mortgage deed dated the 30th of October, 1885. At the time of the execution of that deed there were two properties conveniently called the paper mills and the reversion, which were subject to a first mortgage effected by two deeds, each dated the 26th of October, 1876, by which both properties were mortgaged to *Howard* for one sum of £6000. By a deed dated the 15th of May, 1882, both the same properties were mortgaged to the Plaintiff *Flint* to secure £5000. This deed contained a number of other properties as security for the £5000. By a deed dated the 30th of April, 1884, the paper mills alone and not the reversion were mortgaged to *Flint* to secure £2500. By a deed dated the 3rd of February, 1885, both properties were mortgaged to *Munns* to secure £1700.

Subject to these mortgages the equity of redemption of both properties was vested in *Phipps*, the mortgagor. Under these circumstances the deed of the 30th of October, 1885, was executed. It was made between *Flint* of the first part, *Phipps* of the second part, and *Howard* of the third part. It recites the several mortgages I have mentioned except the mortgage to *Munns*, which is not mentioned in the deed, and then recites that *Howard* had agreed at the request of *Phipps* to pay to *Flint* the £2500 due upon the mortgage of the 30th of April, 1884, and to lend to *Phipps* the further sum of £4000, and that *Flint* at the request of *Phipps* had agreed to release the paper mills from the mortgage of the 15th of May, 1882, and the £5000 and interest thereby secured. *Flint* then assigns the £2500 and the securities for it. *Phipps* covenants to pay *Howard* £6500, being the £2500 and the further advance of £4000; and *Flint* and *Phipps* convey to *Howard* the paper mills free from all principal money and interest secured and all claims and demands under the mortgage of the 15th of May, 1882, to *Flint*. *Phipps* also assigns to *Howard* the reversion, subject, *inter alia*, to the mortgage of the 15th of May, 1882, and a new proviso for redemption is made on payment of £6500 being the £2500 paid to *Flint* and the further advance of £4000 to *Phipps*.

To complete the history of the case, on the 21st of December, 1885, *Phipps* mortgaged the paper mills to another person, *Rest William Flint*, for £2500. In 1888 *Phipps* assigned the equity of redemption in all these properties for the benefit of his creditors. On the 1st of November, 1890, *Flint* foreclosed the reversion, and became absolute owner of it subject to *Howard's* mortgage for £6000. In 1891 the owners of *Munns'* mortgage obtained a decree of redemption and foreclosure against the owners of *Howard's* mortgage and subsequent incumbrances. The time for redemption has been enlarged, and has not yet expired.

On the 13th of June, 1891, this action was brought by *Flint* against all parties interested in these properties, asking for a declaration that on paying off *Howard's* mortgage of the 26th of October, 1876, he is entitled, 1. to the reversion absolutely, and to the paper mills as a security for what he so pays, or, 2. that

C. A.
1893
FLINT
v.
HOWARD.
Kay, L.J.

the amount due under that mortgage ought to be borne rateably by the reversion and the paper mills according to their respective values. The learned Judge has adopted the latter alternative.

There are certain rules of law relating to mortgages which have been very long established. On of them may be shortly stated as follows. In *Lanoy* v. *Duke of Athol* (1), Lord *Hardwicke* said that if a person having two estates mortgaged both to *A.* and then one only to *B.*, who had no notice of *A.'s* mortgage, *B.* might, as against the mortgagor, compel the payment of the first mortgage out of the estate on which he had no charge, according to the ordinary doctrine of marshalling. It was also held that this might be done not only against the mortgagor, but also against those claiming under him as volunteers as, for example, if the mortgagor had died and the two estates had descended to different heirs. But if there was a second mortgage of one estate to *B.*, and also subsequently a second mortgage of the other estate to *C.*, the matter is more complicated. *C.*, although he had no notice of the prior mortgage on both properties to *A.*, would not then be able to throw it on the property mortgaged to *B.*, but the equity between *B.* and *C.* would be to apportion the first mortgage between the two properties according to their respective values: *Barnes* v. *Racster* (2); *Bugden* v. *Bignold* (3).

In the last-mentioned case *C.* claimed, on the ground that he had no notice of the mortgage to *A.*, to throw the whole of it upon the estate mortgaged to *B.* It was held that although he had no notice he could not do this, but because he had no notice *B.* could not insist on a similar right against him. The foundation of the decision is thus stated (4): "The mortgage debt of £500 was made a charge, rateably and without preference, on the freehold and copyhold properties. *Primâ facie* they must bear it rateably and without preference. It lies upon those who assert that a different course should take place, to make and prove a case for it. That they should raise a doubt is not sufficient."

In *Gibson* v. *Seagrim* (5), Lord *Romilly* stated the law thus: "If two estates are mortgaged to *A.*, and one is afterwards mort-

(1) 2 Atk. 444, 446.
(2) 1 Y. & C. Ch. 401.
(3) 2 Y. & C. Ch. 377.
(4) Ibid. 398.
(5) 20 Beav. 614, 619.

gaged to *B.*, and the remaining estate is afterwards mortgaged to *C.*, *B.* has no equity to throw the whole of *A.'s* mortgage on *C.'s* estate, and so destroy *C.'s* security. As between *B.* and *C.*, *A.* is bound to satisfy himself the principal, interest, and costs due to him out of the two estates rateably, according to the respective values of such two estates, and thus to leave the surplus proceeds of each estate to be applied in payment of the respective incumbrances thereon." As so stated the rule is independent of the question whether *C.* had notice of *A.'s* mortgage or not. I am not satisfied that the rights of *B.* and *C.* to have *A.'s* mortgage debt apportioned depends upon whether *C.*, when he took his security, had notice of *A.'s* mortgage. If it had been decided that after the mortgage of one of the properties to *B.*, the mortgagor could not alter *B.'s* position by mortgaging the other to *C.*, that would be intelligible; *B.* would then have against *C.* the same right which he had against the mortgagor, viz., to throw *A.'s* mortgage debt upon the property mortgaged to *C.* That is not so where *C.* had no notice of *A.'s* mortgage. Why should notice of that mortgage alter the right of *C.* as against *B.*? The true ground seems to me to be indicated in *Averall* v. *Wade* (1) and other cases. The right of a subsequent mortgagee of one of the estates to marshall—that is, to throw the prior charge on both estates upon that which is not mortgaged to him—is an equity which is not enforced against third parties, that is, against any one except the mortgagor and his legal representatives claiming as volunteers under him. It is not enforced against a mortgagee or purchaser of the other estate. If both estates are subject to separate second mortgage the Court apportions the first mortgage between them.

But in this case I think that whatever might have been the decision otherwise, the effect of the deed of the 30th of October, 1885, was to prevent *Flint*, if he should pay off the first mortgage, from throwing the whole debt upon the paper mills as against *Howard's* second mortgage for £2500. *Howard* and *Flint* were both parties to that deed. The object of it was to effect an arrangement between them and the mortgagor. *Howard* paid *Flint* £2500, and took a second mortgage for that sum upon the

(1) L. & G. temp. Sugd. 252.

C. A.
1893
FLINT
v.
HOWARD.
Kay, L.J.

paper mills, and also for his further advance of £4000. It is plain upon the face of this deed that *Flint* was to have the reversion and *Howard* the paper mills, subject only to the first mortgage which covered both: and to allow *Flint* to pay off that mortgage and then to throw more than a just proportion of the debt upon the paper mills would, I think, be contrary to the arrangement thereby made.

For these reasons I think that the decision of the learned Judge was right, and that the appeal should be dismissed.

LOPES, L.J., concurred.

Solicitors for Plaintiff: *Flint & Gardner.*

Solicitors for Defendants: *Kearsey, Hawes & Walsh; Sharpe, Parker & Co.*, agents for *E. W. & V. Knocker, Dover; Coode Kingdon & Cotton*, agents for *A. C. Hillman, Eastbourne; W. H. Herbert.*

M. W.

WALLIS *v.* HANDS.

CHITTY, J.

1892
Nov. 30; *Dec.* 1, 6, 7, 8, 10, 13.
1893
Feb. 16.

[1890 W. 1934.]

Lease—Surrender by Act and Operation of Law—Oral Assent of Lessee—Change of Possession—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 3—*Real Property Act*, 1845 (8 *&* 9 *Vict. c.* 106), *s.* 3—*Interesse termini—Covenant for Quiet Enjoyment—Trespass—Damages.*

The grant of a new lease in possession, with the oral assent merely of a person in possession under a prior subsisting lease, does not operate as a surrender in law of the prior lease; such grant and mere oral assent not being sufficient to take the case out of the operation of the *Statute of Frauds*, sect. 3. There is no surrender by operation of law, unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents.

Davison v. *Gent* (1) followed; *Thomas* v. *Cook* (2) and *Lyon* v. *Reed* (3) reconciled on this point.

Dictum of *Stirling*, J., in *Baring* v. *Abingdon* (4), as to effect of the decision in *Davison* v. *Gent*, explained and corrected.

A person having only an *interesse termini* cannot maintain an action on a covenant for quiet enjoyment; neither can he maintain an action for trespass, or for damages.

Gillard v. *Cheshire Lines Committee* (5) distinguished.

ACTION.

The object of this action was to establish the Plaintiff's title to a lease of certain collieries, dated the 8th of August, 1887. The dealings with the property by the lessors and lessees, both before and after August, 1887, were conflicting, and were further complicated by the fact that the leases themselves, which were numerous, were derived from two adverse titles, some being granted by one *Newman*, who was a Defendant, and others by the representatives of one *Emmett*, who were not parties to this action; the oral testimony, also, was very contradictory. Of the various questions raised and argued during the trial, the only ones calling for a detailed report were—(1.) whether a certain prior lease of these collieries had been surrendered by act and operation of law; and (2.) whether the Plaintiff, having only an *interesse termini*, could maintain that part of his action which

(1) 1 H. & N. 744.
(2) 2 B. & Al. 119.
(3) 13 M. & W. 285.
(4) [1892] 2 Ch. 374, 381.
(5) 32 W. R. 943.

CHITTY, J.
1893
WALLIS
v.
HANDS.

claimed damages against his lessor for breach of the covenant for quiet enjoyment, and compensation from some of the Defendants for wrongful working. Under these circumstances, the facts, arguments, and so much of the judgment as are not relevant to these questions, are omitted.

By a lease of the 15th of November, 1884, the Defendant *Newman* demised the upper series, or seams of coal and minerals under certain lands at *Mangotsfield*, in the county of *Gloucester*, with divers mineral rights in connection therewith, to *Powell*, *Charles*, and *Stone*, for the term of forty-five years from the 24th of June, 1884, renewable for another term of forty-five years, at the rent and royalties thereby reserved.

The lessees took possession under this lease, opened some pits, and did some working; but their means were exhausted, their rent was in arrear, and their working had practically come to a stand-still in or before the beginning of 1887, when the Plaintiff entered into negotiations for the purchase of this lease or the grant of a fresh one.

By a lease of the 8th of August, 1887, the Defendant *Newman* demised to the Plaintiff the upper series of coal as in the lease of 1884, together with the lower series under the same area, and some additional land, for a term of forty-two years from the 24th of June, 1887, at the rent and royalties thereby reserved; the lease did not contain any express covenant by the lessor for quiet enjoyment. Though the lease purported to be in possession, the Plaintiff never entered into possession under it, and never commenced any working in accordance with his covenants, nor did he procure any assignment or delivery up to him of the lease of 1884; it appeared, however, that the lease of 1887 was granted with the consent of the lessees of the lease of 1884, such consent being given orally only, by their solicitor, acting on their behalf and with their authority, under circumstances more fully referred to in the judgment.

In February, 1888, the lease of 1884 was assigned by the lessees to the Defendant *Scott*, and subsequently by him to the *District of Bristol Collieries Company, Limited.* Since the commencement of this action the company had reassigned it to *Scott.*

On the 30th of December, 1889, the Defendant *Newman* pur-

ported to lease the coal in the lower series, and the additional lands included in the lease to the Plaintiff, to the Defendant *Scott*, who had arranged to grant an underlease thereof to the Defendant *Hands*.

The Defendant *Hands* and the company, with the consent, as the Plaintiff alleged, of the Defendant *Newman*, had commenced working the coal and minerals comprised in the lease to the Plaintiff of the 8th of August, 1887.

In July, 1890, the Plaintiff commenced the present action against *Hands*, *Newman*, *Scott*, and the company, claiming (*inter alia*) a declaration that the lease of the 8th of August, 1887, was a valid and subsisting lease, and to have his title to the premises comprised therein established, in priority to all claims of the Defendants, or any of them; an injunction to restrain the working of coal and minerals from the said premises; and compensation from the Defendant *Hands* and the company for coal and minerals worked by them; and damages against the Defendant *Newman* for breach of the covenant for quiet enjoyment implied in the lease of the 8th of August, 1887.

Alexander, Q.C., and *Christopher James*, for the Plaintiff:—

The grant of the new lease of 1887 by the Defendant *Newman* to the Plaintiff, with the assent of the lessees under the lease of 1884, being a lease in possession, operated as a surrender in law of the lease of 1884: *Thomas* v. *Cook* (1); *Nickells* v. *Atherstone* (2). The conduct of the parties in the present case affords a strong presumption that the lessees of 1884 assented to the grant of the new lease to the Plaintiff in 1887, so as to determine their interest by act and operation of law: *Walker* v. *Richardson* (3). It is not necessary that any formal instrument should be executed for the purpose of putting an end to the prior lease; the effect of the decision in *Davison* v. *Gent* (4) is, as stated by Mr. Justice *Stirling* in *Baring* v. *Abingdon* (5), that the grant of a new lease by a lessor to a stranger, with the assent of the lessee, will operate as a surrender of the old lease. Such grant and assent are sufficient

(1) 2 B. & Al. 119.
(2) 10 Q. B. 944.
(3) 2 M. & W. 882.
(4) 1 H. & N. 744.
(5) [1892] 2 Ch. 381.

CHITTY, J.
1893
WALLIS
v.
HANDS.

to take the case out of the operation of the *Statute of Frauds*, sect. 3. The covenant for quiet enjoyment implied in the lease of 1887 has been broken, and the Plaintiff is consequently entitled to damages; the Plaintiff is also entitled to damages, by way of compensation, from the Defendant *Hands*, and from the company for trespass in wrongfully working coal and minerals included in the Plaintiff's lease.

[CHITTY, J.:—Supposing there has been no surrender by operation of law of the 1884 lease, so that the Plaintiff only has an *interesse termini*, could you then maintain an action for trespass?]

Yes; a person having only an *interesse termini* can maintain an action for injury to his right: *Gillard* v. *Cheshire Lines Committee* (1).

Whitehorne, Q.C., and *T. L. Wilkinson*, for the Defendant company:—

The Plaintiff has never been in occupation of the property demised to him by the lease of 1887; consequently, as between the lessees of 1884 and those claiming under them on the one hand, and the Plaintiff on the other, there has been no change of possession, and consequently there has been no surrender by act and operation of law. *Thomas* v. *Cook* (2), and *Walker* v. *Richardson* (3) are at variance with *Lyon* v. *Reed* (4); but in *Thomas* v. *Cook* there was, as a fact, a change of possession: *Creagh* v. *Blood* (5). In *Davison* v. *Gent* (6), it is stated that where a lessee assents to a lease being granted to another, and gives up his own possession to the new lessee, that is a surrender by operation of law: that is the real state of the law on this subject; and the *dictum* of Mr. Justice *Stirling* in *Baring* v. *Abingdon* (7) is not correct. Change of possession is a necessary part of the consent. To hold, as the Plaintiff contends, that mere oral assent to a new lease operates as a surrender in law would be a most dangerous doctrine: it would practically amount to a

(1) 32 W. R. 943.
(2) 2 B. & Al. 119.
(3) 2 M. & W. 882.
(4) 13 M. & W. 285.
(5) 3 J. & Lat. 133, 160.
(6) 1 H. & N. 744.
(7) [1892] 2 Ch. 381.

repeal of the *Statute of Frauds*, and would let in all the mischief against which the statute intended to guard. [*Doe* v. *Johnston* (1); *Johnstone* v. *Hudlestone* (2); and *Oastler* v. *Henderson* (3), were also referred to.]

Levett, Q.C., and *Pauli*, for the Defendant *Newman*:—

The essence of a breach of covenant for quiet enjoyment is a disturbance of the lessee's possession, and in this case the Plaintiff never had possession under the 1887 lease. To maintain an action for trespass, the Plaintiff must have possession: *Roscoe's* Nisi Prius Evidence (4). We adopt the argument that there has been no surrender of the 1884 lease by operation of law, and in addition we say a person having a mere *interesse termini* cannot bring an action for trespass: *Harrison* v. *Blackburn* (5); *Turner* v. *Cameron's Coalbrook Steam Coal Company* (6); and the Plaintiff's claim is in the nature of an action for trespass. An *interesse termini* will not support an action for a declaration of title, nor for damages for breach of quiet enjoyment, nor, as already stated, for trespass. As to the case of *Gillard* v. *Cheshire Lines Committee* (7), that is distinguishable: in that case a proprietary right was injured. The right form of action would have been against the Defendant *Newman* for not putting the Plaintiff into possession: *Coe* v. *Clay* (8); *Jinks* v. *Edwards* (9); *Drury* v. *Macnamara* (10). No action will lie for damages unless there has been entry by the lessee: *Lowe* v. *Ross* (11). This action, therefore, wholly fails.

W. F. Webster, for the Defendant *Hands*, and *T. Lee Roberts*, for the Defendant *Scott*, adopted the arguments of their co-Defendants, but took no further part in them.

Alexander, in reply:—

The authorities relied on by the Defendant company do not

(1) M'Cl. & Y. 141.
(2) 4 B. & C. 922.
(3) 2 Q. B. D. 575.
(4) 16th Ed. p. 930.
(5) 17 C. B. (N.S.) 678, 691.
(6) 5 Ex. 932.
(7) 32 W. R. 943.
(8) 5 Bing. 440.
(9) 11 Ex. 775.
(10) 5 E. & B. 612.
(11) 5 Ex. 553.

CHITTY, J.
1893
WALLIS v. HANDS.

bear out the proposition attempted to be laid down. It is always a question for the jury whether there has or has not been assent on the part of the old lessee to the grant of a new lease; in the present case there has been such assent; the interpretation placed by Mr. Justice *Stirling* on the old cases in *Baring* v. *Abingdon* (1) is the correct one.

The case of *Gillard* v. *Cheshire Lines Committee* (2) is a complete answer to the argument that an *interesse termini* will not support this action even if there has been no surrender.

Lock v. *Furze* (3) shews that we can bring an action for damages for breach of the covenant for quiet enjoyment; and *Wood* v. *Morewood* (4) shews that an action for trover would lie for the coal taken away.

Levett, replied on fresh cases cited in reply.

1893. Feb. 16. CHITTY, J.:—

The next question is one of law: whether the lease of 1884 has (as the Plaintiff contends) been surrendered by operation of law. The lease itself was not delivered to the Plaintiff, nor to the lessor *Newman* or his solicitors, upon the grant of the lease of 1887, which latter lease (as already appears) purported to be a lease in possession. The lease of 1884 had been lent by the lessee's solicitor *Nicholas* to the Plaintiff in April, 1887, for perusal, and the Plaintiff had returned it to *Nicholas*. It was not left in the possession of *Newman* or his solicitors, but apparently remained in the hands of the Defendant *Scott's* solicitor, *Nicholas*, or of his other clients, the original lessees. It was produced by the Defendant *Scott* at the trial. Since it was returned to *Nicholas* it has never been in the Plaintiff's possession. It has been dealt with adversely to him as if it were a subsisting lease as follows. It was assigned by the lessees *Powell* and others to the Defendant *Scott* by indenture dated the 13th of February, 1888; and it was assigned by *Scott* to the Defendant company by indenture dated the 30th of May, 1888. It has since the issuing of the writ been re-assigned by the Defendant company to *Scott*, in whom it is now vested, if subsisting. These three assignments

(1) [1892] 2 Ch. 381.
(2) 32 W. R. 943.
(3) Law Rep. 1 C. P. 441.
(4) 3 Q. B. 440, n.

were produced in Court. The lease of 1887, which includes all the property comprised in the 1884 lease, was granted with the consent of the lessees of 1884; such consent was given, but orally only, by *Nicholas*, acting on their behalf and with their authority, on the occasion of the delivery of the lease of 1887 to the Plaintiff on the 27th of September, 1887. But the Plaintiff (as already stated) has never been in possession of the property demised by the lease of 1887; consequently, as between the lessees of 1884 and those claiming under them on the one hand, and the Plaintiff on the other, there has been no change of possession. In these circumstances it is contended for the Plaintiff, as a proposition of law, that the grant of a new lease in possession, with the oral assent merely of a person in possession under a prior subsisting lease, operates as a surrender in law of the prior lease; and, consequently, that such grant and mere oral assent are sufficient to take the case out of the operation of the 3rd section of the *Statute of Frauds*, which enacts that no leases shall be surrendered unless by deed or note in writing, or by act and operation of law. The 3rd section of the statute 8 & 9 Vict. c. 106, avoids a surrender in writing, unless made by deed, except in cases where the lease itself might have been created without a deed. The lease of 1884 required a deed for its creation. All the authorities bearing on this question of surrender by operation of law were cited and commented on at the Bar. The question again raises the controversy which subsisted at one time between the Courts of King's Bench and the Exchequer, illustrated by *Thomas* v. *Cook* (1) and *Lyon* v. *Reed* (2), and discussed at length in *Smith's* Leading Cases (3). But it appears to me that this controversy was, so far as concerns the question before me, set at rest by the judgment of the Court of Exchequer in *Davison* v. *Gent* (4). In *Thomas* v. *Cook* there was in fact a change of possession, the old tenant *Cook* having gone out of possession when the plaintiff accepted *Perkes* as his tenant. (See the observations of Lord *St. Leonards* in *Creagh* v. *Blood* (5).) In his judgment in *Davison* v. *Gent* Chief Baron

(1) 2 B. & Al. 119.
(2) 13 M. & W. 285.
(3) 8th Ed. vol. ii. p. 884, *et seq.*
(4) 1 H. & N. 744.
(5) 3 J. & Lat. 160.

CHITTY, J.
1893
WALLIS v. HANDS.

Pollock states the law thus (1): "It must therefore be taken to be established that where a lessee assents to a lease being granted to another, and gives up his own possession to the new lessee, that is a surrender by operation of law." This statement appears to me not to be qualified by any subsequent expressions in the same judgment. It substantially reconciles *Thomas* v. *Cook* (2) with the principles enunciated by Baron *Parke* in *Lyon* v. *Reed* (3), so far as relates to leases in possession. It is not, perhaps, of any great practical importance in which of the two following ways the proposition of law is stated: (1.) there is no surrender by operation of law unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents; or (2.) the change of possession is a necessary part of the consent. I prefer, however, the first, as being the more correct form. To hold that mere oral assent to the new lease operates as a surrender in law would be a most dangerous doctrine: it would practically amount to a repeal of the *Statute of Frauds*, and let in all the mischief against which the statute intended to guard; the policy of that statute is carried still further by the statute 8 & 9 Vict. c. 106, s. 3, which requires a deed in cases where formerly a mere writing would have sufficed. The foundation of the doctrine that the acceptance of a new lease by an existing tenant operates as a surrender in law is estoppel by act *in pais*, the law attributing the force of estoppel to certain acts of notoriety, such as livery of seisin, entry, acceptance of an estate, and the like; and the grant of a new lease to a stranger, with the tenant's assent, and change of possession preceding or following the lease, bring such a case within the scope of the same doctrine, which mere oral assent would not do (see *Shelford's* Real Property Statutes by *Carson* (4)).

The Plaintiff's counsel relied on a *dictum* of Mr. Justice *Stirling* in *Baring* v. *Abingdon* (5), that the granting of a new lease to a stranger with the assent of the lessee operates as a surrender of the old lease. But on the facts of the case it appears that there was a change of possession: the learned Judge himself

(1) 1 H. & N. 749.
(2) 2 B. & Al. 119.
(3) 13 M. & W. 285.
(4) 9th Ed. p. 259.
(5) [1892] 2 Ch. 381.

refers to *Davison* v. *Gent* (1), and I have his authority for stating that he did not intend to express any opinion on the point whether a change of possession was necessary.

For the reasons stated I am of opinion that the lease of 1884 was not surrendered by operation of law.

The next set of the numerous questions raised relates to the Plaintiff's claims for damages. These must be dealt with separately.

First, the Plaintiff claims damages against the Defendant *Newman* for breach of the covenant for quiet enjoyment implied in the lease of 1887. Such an implied covenant is, speaking generally, an unqualified covenant, but extends only to lawful interruptions. On the 30th of December, 1889, *Newman* granted to *Scott* a lease for forty years, from the 24th of June, 1889, of the lower series only of the coal lying under the land described in the 1884 lease. On the 31st of December, 1889, *Scott* granted to *Hands* an underlease of the coal comprised in the lease of the 30th of December, 1889, reserving a nominal reversion only. *Hands* has worked coal by virtue of this underlease; but his working has been apparently confined to coal comprised also in another lease granted by *Emmett's* representatives; but this is not quite clear. On the 30th of December, 1889, *Newman* entered into an agreement in writing with *Scott*, to grant to him a lease of the additional area comprised in the 1887 lease, so as to make *Scott's* holding co-extensive with the coal comprised in the 1887 lease. On the same day, *Scott* agreed with *Hands* to assign or underlet to him this additional area. But these dealings by *Newman* in December, 1889, and any entry thereunder, are not relied upon by the Plaintiff as breaches of the implied covenant, because, according to the Plaintiff's case, they are unlawful as against him, claiming as he does under the prior lease of 1887. The alleged breach arises, as I understand the argument for the Plaintiff, upon the lease of 1884. The mere fact of the existence of that lease is of itself no breach. The Plaintiff alleges that the lease of 1884 was delivered by *Newman* to the lessees. But this allegation is disproved by the evidence. The Plaintiff was aware of the existence of this lease when he accepted the

(1) 1 H. & N. 744.

CHITTY, J.
1893
WALLIS
v.
HANDS.

lease of 1887, and had taken his own measures, though ineffectual, for protecting himself against claims under the lease of 1884. It may be questioned whether, in these circumstances, the implied covenant would extend to disturbance by virtue of the lease of 1884: see *Bythewood* (1), and *Dart's* Vendors and Purchasers (2); and see also *Birmingham, Dudley and District Banking Company* v. *Ross* (3), on the analogous case of an implied grant of light. The question, however, was not argued, and I pass it by. I rest my decision on the following grounds: First, on the facts, which shew that the negotiations which resulted in the grant of the lease of 1887 were conducted throughout on the footing, that as between the Plaintiff and the Defendant *Newman*, the Plaintiff should buy up from the lessees the lease of 1884. The refusal of *Newman's* solicitor to deliver the lease of 1887 to the Plaintiff, without the lessee's consent, is a strong circumstance. In short, I think that the true view of the facts, and the correct inference from them is, that there was an implied agreement between the Plaintiff and the Defendant *Newman*, through his solicitors, that the Plaintiff should make his own terms with the lessees in regard to the lease of 1884, and that he should get in that lease. This being so, the Plaintiff cannot set up claims under the 1884 lease as breaches of the covenant for quiet enjoyment.

Secondly, the essence of a breach of a covenant for quiet enjoyment in a lease appears to me to be a disturbance of the lessee's possession: see *Sanderson* v. *Mayor of Berwick-upon-Tweed* (4). There has been no disturbance of possession in this case. The Plaintiff has merely an *interesse termini* under the lease of 1887; he has not only never been in possession of the property comprised in that lease; but there is no evidence of his ever having even attempted to take possession, or having required *Newman* to put him in possession. On the contrary, shortly after the delivery to him of the lease of 1887 he began to complain that the lease was wrongly drawn, and insisted that it should be rectified, and that the question of rectification should be referred to arbitration. He did not abandon this position until the commencement of the

(1) 3rd Ed. vol. ix. p. 381.
(2) 6th Ed. p. 886.
(3) 38 Ch. D. 295.
(4) 13 Q. B. D. 547.

present action. The law provides a person having an *interesse termini* with an adequate remedy against the granter of the term, without there being any necessity to have recourse to an action on the covenant for quiet enjoyment; he can bring an action against the granter of the term for not putting him in possession: see *Coe* v. *Clay* (1) and *Jinks* v. *Edwards* (2). This right of action is also founded on implied covenant. The present action is not to enforce any such right; nor are there any facts proved which would give rise to it. Although the authorities have been searched through by counsel, none can be produced to shew that a person having a mere *interesse termini* can maintain an action on a covenant for quiet enjoyment.

In *Lock* v. *Furze* (3), which was cited as the nearest authority on the point, the plaintiff was in possession when the lease, originally reversionary, but then possessory, was avoided by title paramount; and he remained in possession for a short period (some twenty days) during the currency of the term granted by the avoided lease, upon the covenant in which the action was brought. It is consequently no authority on the point.

Thirdly, the Plaintiff claims compensation or damages against *Hands* in respect of his working. The Plaintiff's allegation, in his statement of claim, against *Hands* is, that he has worked coal comprised in the lease of 1887 without specifying from what part of the property the coal has been worked. *Hands*, by his silence in his defence, admits this allegation. The working may, therefore, have been of coal comprised in the 1884 lease, or in that part of the property comprised in the lease of 1887 which was not comprised in the 1884 lease. As regards coal in the 1884 lease, the Plaintiff cannot sue, inasmuch as that lease, which has priority over the 1887 lease, has never been vested in him. As regards any coal worked by *Hands* not within the area of the 1884 lease, the Plaintiff, as against *Hands*, relies on his title under the 1887 lease. Having but an *interesse termini*, he cannot maintain an action of trespass against *Hands*. His proper course as against *Hands* was to bring an action to recover possession, in which case *Newman* would have had opportunity of coming in

(1) 5 Bing. 440. (2) 11 Ex. 775.
(3) Law Rep. 1 C. P. 441.

CHITTY, J.
1893
WALLIS
v.
HANDS.

to defend, and the Plaintiff would then have had to face the difficulties in his way arising from his 1887 lease being forfeitable. It is settled law, that a person having a mere *interesse termini* cannot bring an action of trespass: see *Harrison* v. *Blackburn* (1), *Turner* v. *Cameron's Coalbrook Steam Coal Company* (2), and *Woodfall's* Landlord and Tenant (3). This is in substance an action of trespass. The Plaintiff's counsel, however, cited the decision of the Court of Appeal in *Gillard* v. *Cheshire Lines Committee* (4). The Court there held that a person having a mere *interesse termini* could maintain an action for injury to his right. The cases on trespass, though not cited, were of course present to the minds of the members of the Court who so held; there was no intention to overrule them, either directly or indirectly. The circumstances shortly stated were, that the plaintiff had agreed to take a theatre for eight weeks, to commence on a future day. Before his right of entry accrued, the defendants, who were strangers, by excavations on their own property deprived the theatre of the support of the adjacent land, so that the theatre was rendered unsafe, and was closed during the eight weeks by the proper authorities. The judgment turned on the proposition that the defendants had injured the plaintiff's proprietary right. While accepting that decision, as I am bound to do without question, I think that it does not apply to the facts of this case, which I need not repeat. The Plaintiff has refrained, and as I think deliberately refrained, from exercising his right of entry under his voidable lease of 1887. I think he is not entitled to any damages; if I thought otherwise, I should assess them at a mere nominal sum.

The reasons upon which I refuse to give the Plaintiff damages are sufficient, and more than sufficient, to justify my refusing to grant an injunction.

Solicitors: *Whites & Co.; John Hands; Learoyd, James, & Mellor,* agents for *W. J. Nicholas, Bristol; Prior, Church, & Adams,* agents for *Meade-King & Bigg, Bristol; Greenop & Sons.*

(1) 17 C. B. (N.S.) 678, 691.
(2) 5 Ex. 932.
(3) 13th Ed. p. 197.
(4) 32 W. R. 943.

W. C. D.

ATTORNEY-GENERAL *v.* CORPORATION OF MANCHESTER.

CHITTY, J

1893

Feb. 17, 18, 24; *March* 2.

[1893 A. 195.]

Small-pox Hospital—Public Nuisance—Injunction—Balance of Convenience—Action quia timet—Nuisance at Common Law.

Anyone seeking an injunction to restrain an alleged future nuisance, whether public or private, must shew a strong case of probability that the apprehended mischief will in fact arise. Principles on which the Court proceeds in granting or refusing injunctions in *quia timet* actions, and the result of the authorities on this, and on nuisance at Common Law, stated and discussed.

The Defendants proposed to establish a small-pox hospital on land of their own in an adjoining district, within 240 yards of two public roads, within 90 yards of a much-used part of a cemetery, and within 256 yards of the nearest residence; the Plaintiffs contended that what the Defendants proposed to do amounted to a public nuisance, as being dangerous to the health of the neighbourhood, and applied for an injunction:—

Held, that in the present state of science the Plaintiffs had failed to shew that there was a probability that the apprehended danger would in fact ensue.

If in such a case the evidence shewed that the maintenance of a small-pox hospital was on the whole more beneficial to the health of the public at large than the leaving of the persons suffering from the disease scattered in their own homes, query whether some weight might not properly be allowed to this circumstance.

Observations of Lord *Hardwicke* in *Baines* v. *Baker* (1) considered.

MOTION.

This was an application by the Attorney-General, at the relation of the *Withington* District Local Board and certain private owners of property in the neighbourhood, to restrain the Defendants, until the trial of the action, from establishing in the Southern Cemetery at *Withington*, near *Manchester*, any hospital or hospitals for the reception of persons suffering from small-pox, or other infectious diseases, so as to cause a nuisance to the inhabitants of the neighbourhood, or to persons frequenting the said cemetery.

The city of *Manchester* had for some time been suffering from

(1) Amb. 158.

CHITTY, J. 1893 ATTORNEY-GENERAL v. CORPORATION OF MANCHESTER.

an epidemic of small-pox; *Monsall Hospital*, which lay within the city, and in which the small-pox patients had been hitherto accommodated, had become full and overcrowded, and the Defendants, as the urban sanitary authority, being desirous of providing further accommodation, had fixed upon the cemetery at *Withington*, which was their own property, as affording a suitable site for the erection of a temporary additional hospital for persons suffering from small-pox. The cemetery contained ninety-seven acres.

It appeared that there was no other available site within the Defendants' own district, and that the Defendants had no means of acquiring any other site within a reasonable time.

The site chosen for the proposed hospital was at the west end of the cemetery, and was to be about eight acres in extent, and was to be fenced round with a high wooden fence; the hospital was to be placed in the centre of this site, and would be distant upwards of 200 yards from a frequented highway known as the *Barlow Moor Road*, on the south; about 240 yards from a public lane known as *Nell Lane*, on the north; and about 450 yards from a lane on the west side which joined the highway and *Nell Lane*.

The hospital was intended to be a temporary one, sufficient for the reception of not more than sixty patients.

The nearest part of the cemetery to the hospital was the Nonconformist burial-ground, which was much used; the nearest portion of this burial-ground was about ninety yards from the hospital. It was stated that in the year 1892 there had been 2800 burials in the cemetery, and that as many as 45,000 persons attended the grounds. The cemetery itself was also much used as a place of resort by visitors from *Manchester* and the surrounding districts. For further facts as to the position and area of the cemetery and district, see *Withington Local Board of Health* v. *Corporation of Manchester* (1).

There were mortuary chapels, and a registrar's office on the cemetery; the nearest mortuary chapel was about 180 yards from the proposed hospital; the registrar's office was 413 yards distant. The district of *Withington* was sparsely inhabited at

(1) *Ante*, p. 19.

present, the number of houses within a half-mile radius of the proposed hospital being 15, the nearest house being 256 yards distant.

In the conduct of the hospital, when opened, the Defendants intended to employ the best methods and appliances known to modern science for preventing the spread of the disease and for the safety of the public health.

The medical evidence on both sides was conflicting and voluminous, and included the elaborate reports to the Local Government Board, 1885–1886 (the *Fulham Small-pox Hospital*), and 1887–1888 (on the Epidemic of Small-pox at *Sheffield*), which were illustrated by spot maps and concentric circles, to shew that small-pox hospitals were a centre of infection. The Defendants had evidence from very eminent medical men to the effect that the proposed hospital, situate and carried on as it was proposed to be, would not be a source of any appreciable danger to public health. The result of this evidence is referred to in the judgment.

Sir *H. Davey*, Q.C., *Farwell*, Q.C., and *Clare*, for the motion:—

The ground on which the present application is based is that of an apprehended public nuisance; the establishment of a small-pox hospital is *per se* a nuisance; and we have a right to get an injunction to protect ourselves against the importation of foreign infection: *Metropolitan Asylum District* v. *Hill* (1). It is established by our evidence that a small-pox hospital is a centre from which the disease, somehow or other, is spread to an extent dangerous to public health, for a distance of a half-mile radius; even the Defendants' evidence admits that it is not safe to have an intervening space of less than 200 yards from the hospital, and the most frequented part of the cemetery is only ninety yards off. It is an indictable offence to bring persons suffering from small-pox along the highway: *Rex* v. *Vantandillo* (2), and *Rex* v. *Burnett* (3); and the Defendants ought to prove that the precautions they propose to adopt will be sufficient. We submit that we have made out a clear case of

(1) 6 App. Cas. 193, 205. (2) 4 M. & S. 73.
(3) 4 M. & S. 272.

CHITTY, J.
1893
ATTORNEY-GENERAL v. CORPORATION OF MANCHESTER.

apprehended public nuisance, and that on the balance of convenience and inconvenience we are entitled to have matters kept *in statu quo* until the trial of the action.

Sir *R. Webster*, Q.C., *Byrne*, Q.C., and *A. Macmorran*, for the Defendants:—

The Plaintiffs have failed to make out that there is any real danger to public health, or that this hospital, as we propose to carry it on, will be a public nuisance: *Fleet* v. *Metropolitan Asylums Board* (1), the *Darenth Hospital Camp* case, is in our favour. In that case, too, the question as to the *onus* of proof was raised, and it was held to be on the applicants.

In the present conflict of medical evidence, apart from cross-examination, the Court will not grant an interlocutory injunction. *Fleet* v. *Metropolitan Asylums Board*: *Rex* v. *Vantandillo* (2), and *Rex* v. *Burnett* (3) are not applicable to the present case.

On balance of convenience and inconvenience, it may be more beneficial to the health of the inhabitants at large to confine the small-pox cases in one hospital carefully managed, rather than to leave them to spread infection in the neighbourhood where the patients live, thus making each case a centre of infection. [*Baines* v. *Baker* (4) was referred to.]

On the whole, we submit that the Plaintiffs have failed to make out any case for the interference of the Court.

Sir *H. Davey*, in reply.

1893. March 2. CHITTY, J.:—

This is the third motion which has been made against the corporation of *Manchester* in respect of the hospital they propose to open in the district of the *Withington* Local Board for the reception of small-pox patients. The present action is brought by the Attorney-General, not *ex officio*, but at the instance of relators, and also by private persons as Plaintiffs; but the case

(1) 1 Times L. R. 80; 2 Times L. R. 361.
(2) 4 M. & S. 73.
(3) Ibid. 272.
(4) Amb. 158.

of the private Plaintiffs was not argued at the Bar. The foundation of the motion is an apprehended public nuisance, the nuisance being, not an actual or existing nuisance, but a future nuisance, which, it is alleged, will arise if the hospital is opened. The action, then, is what is technically known as a *quia timet* action. The question as to the principle on which the Court proceeds in granting or refusing an injunction in such actions has been the subject of numerous decisions, among which are *Crowder* v. *Tinkler* (1); *Earl of Ripon* v. *Hobart* (2); *Haines* v. *Taylor* (3); *Hepburn* v. *Lordan* (4); *Attorney-General* v. *Mayor of Kingston* (5); *Salvin* v. *North Brancepeth Coal Company* (6); *Fletcher* v. *Bealey* (7). The principle appears to be the same whether the alleged future nuisance is public or private. In one of the cases to which I have referred, the alleged nuisance was a public nuisance; in others a private nuisance. In some, acts had been done which, it was alleged, would result in future mischief or injury, but which had not already resulted in injury or substantial damage; in others, there was mere threat or intention. But in regard to all such cases the principle is the same. Where it is certain that the injury will arise, the Court will at once interfere by injunction; as, for instance, in the case of a threat to cut a permanent ditch across a public highway. But the Court does not require absolute certainty before it intervenes; something less will suffice (see Lord *Brougham's* judgment in *Earl of Ripon* v. *Hobart*). In *Crowder* v. *Tinkler* (the gunpowder case), Lord *Eldon*, who granted the injunction, spoke of "extreme probability of irreparable injury" (8). In *Attorney-General* v. *Mayor of Kingston*, Vice-Chancellor *Wood*, who refused the injunction, considered the question to be whether there was evidence of an actual nuisance committed, or "evidence of the extreme probability of a nuisance if that which was being done was allowed to continue." In *Fleet* v. *Metropolitan Asylums Board* (9), the *Darenth Hospital Camp* case, where the hospital was in actual operation, the

(1) 19 Ves. 617.
(2) 3 My. & K. 169, 176.
(3) 2 Ph. 209.
(4) 2 H. & M. 345.
(5) 34 L. J. (Ch.) 481; 13 W. R. 888, 891.
(6) Law Rep. 9 Ch. 705.
(7) 28 Ch. D. 688.
(8) 19 Ves. 622.
(9) 1 Times L. R. 80; 2 Times L. R. 361, 362.

CHITTY, J.
1893
ATTORNEY-GENERAL v. CORPORATION OF MANCHESTER.

Court refused the injunction, Lord Justice *Cotton*, in his judgment, laying it down that "the plaintiffs must make out that there was real danger, otherwise, however much they might feel the hospital to be an annoyance, they could not get an injunction." The principle which I think may be properly and safely extracted from the *quia timet* authorities is, that the plaintiff must shew a strong case of probability that the apprehended mischief will, in fact, arise. Before stating the facts, I will make a few observations in regard to public nuisance at Common Law. The Plaintiffs' case is that the Defendants are proposing to do acts which, if done, will constitute a common or public nuisance, and as such will constitute an indictable offence. A great variety of instances of the different kinds of public nuisances will be found collected in *Russell* on Crimes (1), and in *Stephen's* Criminal Digest (2), including *Rex* v. *Vantandillo* (3) and *Rex* v. *Burnett* (4), both small-pox cases, and cited at the Bar in argument before me. Those two cases shew that, although no actual mischief had arisen from the acts done, there may be an indictable offence if there is danger to the public health. In *Reg.* v. *Lister*, the naphtha case (5), the keeping of large quantities of a highly inflammable fluid near a highway to the danger of the public was held to be an indictable offence, though no fire had taken place. In the *Darenth* case Sir *E. Fry* appears to have adopted, as applicable in such cases, Chief Justice *Cockburn's* statement of the law, that it must be shewn that there is "a well-founded and reasonable apprehension of danger." The apprehended future danger in the present case is danger to the public health. Now, undoubtedly, there are many cases of public nuisance—by interference with an unquestionable right of the public, such, for instance, as the permanent obstruction of a highway,—where the Court did decline at once to permit evidence to be given of any supposed public benefit arising from the wrongful act complained of, and would refuse to balance the good alleged to accrue to some portions of the public against the mischief to the public in general. But in

(1) 5th Ed. vol. i. p. 418, *et seq.*
(2) 3rd Ed. p. 126.
(3) 4 M. & S. 73.
(4) Ibid. 272.
(5) Dears. & B. C. C. 209.

the case where the health of the Queen's subjects in general is concerned, it may possibly be a question whether, if the evidence shews that the maintenance of a small-pox hospital is on the whole, balancing the good against the evil, more beneficial to the health of the public at large, or to that portion of the public that inhabits or frequents the neighbourhood, than the leaving of the persons suffering from the disease scattered in their own homes, some weight might not be properly allowed to this circumstance. If Lord *Hardwicke* is rightly reported in the case of *Coldbath-fields Small-pox Hospital—Baines* v. *Baker* (1)—he appears to have entertained some such question when he stated his opinion that the hospital was "a charity like to prove of great advantage to mankind." But, although I throw out these observations as being possibly worthy of future consideration, I state expressly that they do not form any ground of my decision on this motion. I now proceed to deal shortly with the facts.

[His Lordship then stated the facts as above, and continued:—]

About the foregoing facts there is no substantial controversy. The contest begins with the evidence of the medical experts. Each side produces witnesses of high repute, competent from experience and study to speak on the subject of small-pox hospitals. The Plaintiffs' evidence includes elaborate reports to the Local Government Board, such as the report of 1887–88 on the *Sheffield* case, and the report of 1885–86. No imputation is made on the good faith of the expert witnesses. There is an honest difference of opinion, and each side maintains vigorously the opinion expressed in the affidavits. But this evidence has not been submitted to the test of cross-examination. The Plaintiffs' counsel have not relied on the theory of aerial dissemination of the disease: that theory is not yet established. From the affidavits the Plaintiffs' counsel extracted the proposition, which they urged, that a small-pox hospital is a centre from which the disease, somehow or other (it was not for them to say how), spreads to an extent dangerous to public health for the distance of a half-mile radius. It was necessarily admitted that the burden of proof lay on the Plaintiffs; but at one time it seemed as if the

(1) Amb. 158.

CHITTY, J.
1893
ATTORNEY-GENERAL v. CORPORATION OF MANCHESTER.

argument were being put as dividing the evidence into two parts, and as contending that the Plaintiffs had made out a *primâ facie* case which shifted on to the Defendants a burden they had failed to discharge. But the argument was not so put in the reply, the contention being, that there was to be found running through the evidence of the Defendants an admission, express or implied, that it was not safe to leave an intervening clear space of less than 200 yards. I am unable to find any such admission; the substance of the Defendants' evidence is that this hospital, situate and carried on as it will be, will not give rise to any appreciable danger to public health. Much reliance was placed by the Plaintiffs' counsel on the *Sheffield* case in 1887. But the *Sheffield* case presents essentially different conditions from those in the present case. The hospital was placed on the verge of a poor and densely-populated district; there were grave faults in the administration of the hospital, both within and without, and there was a recklessness displayed by the population which seems almost incredible. I confess that I have not been much impressed by the spot maps that accompany and illustrate the report. I question whether they support the inference sought to be established, and whether they are in accordance, as it was said they were, with the strict principles of inductive logic. Each case depends on its own facts; other cases may afford assistance to the experts, but they are not guides which the Court is bound to follow. So far as concerns any former case, whether decided in a court of justice or not, the *Fulham* and *Darenth* cases appear to be more apposite to the present than the *Sheffield* case. In the *Darenth* case the camp hospital contained 1000 patients, and the clear space left around it was only fifty yards; yet it was held that the plaintiff had not made out real danger; and this decision was arrived at on the trial, and after the witnesses had been cross-examined. The Plaintiffs' counsel resorted to the argument of convenience and inconvenience and the propriety of maintaining the existing *status quo*, urging that, if the injunction were refused, irreparable damage might fall on the inhabitants of *Withington*, whereas if it were granted but little or no harm would be sustained by *Manchester*. But this argument cannot prevail; the granting of an injunction might result in penning back this

scourge on the citizens and thus inflict on them irreparable injury. In my opinion, however, the evidence in favour of the Plaintiffs' case is not sufficiently cogent to make the question of granting or refusing the injunction turn on the consideration of convenience or inconvenience. I have purposely refrained from dealing with the medical testimony in detail. It is seldom advisable in a case of this sort to submit conflicting evidence to any critical examination on a motion. The conclusion at which I have arrived is that the Plaintiffs have failed on this motion to make out that there is a probability, much less that there is a high degree of probability, that the apprehended danger will in fact ensue. In parting with the case I think it right to say that the Court ought to exercise great caution before it accepts any general proposition of fact which might tend to the closing of many a well-ordered small-pox hospital in the country. The necessity for caution is all the greater because the doctrine of coming to a nuisance has long since been excluded. I, for the reasons given, refuse the injunction. Costs will be costs in the action.

Solicitors: *Chester & Co.*, agents for *Crofton & Craven, Manchester; Austin & Austin*, agents for *W. H. Talbot*, Town Clerk, *Manchester.*

W. C. D.

NORTH, J.

1892
Dec. 13, 14, 15.
1893
Jan. 12, 17, 18, 19, 24, 25, 27.

COLLINGHAM *v.* SLOPER.

[1892 C. 2801.]

FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY *v.* SLOPER.

[1892 F. 280.]

FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY *v.* SLOPER.

[1892 F. 1320.]

Company—Debenture-holders—Majorities—Administration of Debenture Trusts—Failure of Trusts.

A foreign railway company issued bonds charged on their railway. Owing to litigation and consequent delay in realizing the bonds, it became impossible with the present or prospective resources of the company to carry out the undertaking.

At the suit of a minority of bondholders, the Court administered the unspent part of the proceeds of such bonds in the hands of English trustees, on the footing that such funds ought to be applied, in the first place, in saving and realizing the property charged, and then be distributed *pro ratâ* among the bondholders; and that interest on and amortization of the bonds should cease from the date of the judgment.

THESE three actions were brought by holders of first mortgage bonds of the *Saragossa and Mediterranean Railway Company* (a Spanish company domiciled at *Barcelona*, hereafter called the *Saragossa Company*) for the execution of the trusts of a sum of upwards of £250,000 in the hands of persons called the *London* Commissioners, trustees for the bondholders and the *Saragossa Company*. The Plaintiffs in the action of *Collingham* v. *Sloper* desired to have the funds applied towards the construction and equipment of a railway in *Spain*, the purpose for which the bonds had been issued. The Plaintiffs in the other two actions alleged that the purposes of the *Saragossa Company* had become impracticable, and desired to have the funds divided *pro ratâ* among the bondholders. The Plaintiffs in the actions the *Foreign, American, and General Investments Trust Company* v. *Sloper*, and those supporting them, held 3500 bonds; the

Plaintiffs in *Collingham* v. *Sloper*, and those supporting them, held about eight times as many bonds. The Defendants were Messrs. *Sloper*, *Robinson*, and *Wilde*, the *London* Commissioners; the *Saragossa Company*; and a construction company called the *Aragon and Catalonia Railway Company*.

The railway in question was intended to start from a place called *La Puebla de Hijar* (hereinafter called *Hijar*), forty-three miles from *Saragossa*, a place already in railway connection with *Saragossa*, and to terminate at *San Carlos de la Rapita* (hereafter called *San Carlos*), on the *Mediterranean* coast, a distance of rather less than one hundred miles. It was treated by the engineers as being divided into five sections: the first from *Hijar* to *Alcañiz*; the second and third, between *Alcañiz* and *Cherta*; the fourth and fifth, between *Cherta* and *San Carlos*.

The following are the events which led up to the present litigation:—

In May, 1880, a law was passed by the Spanish Legislature declaring that a railway starting from *Val de Zafan* (*La Puebla de Hijar*), through *Alcañiz*, terminating at *San Carlos de la Rapita*, was of general utility. It was proposed to grant a concession of the railway, and that the concessionaries should enjoy a subvention equal to a fourth part of the estimate for the construction of the railway, which was not to exceed 60,000 pesetas per kilometre.

In May, 1882, special conditions for the granting of a concession were prepared, with a view to a sale of the concession by public auction for a term of ninety-three years. The conditions provided, that the grantee of the concession should construct the railway within six years from the date of the concession; that a deposit of 5 per cent. on the estimated cost, amounting to about £50,000, should be given, not to be returned till the work was concluded; that the work should be commenced within four months from the date of the concession; that the State would aid the construction by a subvention distributable in six equal annual instalments amounting to £200,000, by monthly payments equal to a fourth of the value of the work effected during the month. The concession was to lapse in case the work was not commenced or completed within the stipulated period.

NORTH, J.
1893
COLLINGHAM v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.

An auction having been held, but no sale of the concession effected, a concession of the railway was granted on the 16th of October, 1882, to the *Sociedad General de Obrás Públicas.* In June, 1884, the Spanish Government sanctioned the transfer of the concession to another railway company, whose rights under the concession became in 1887 vested in the Defendants, the *Saragossa Company.*

The *Saragossa Company* was incorporated by Spanish law with a constitution regulated by statutes dated the 16th of September, 1887. The shares of the company were shares to bearer, 25,000 in number, of 500 pesetas (equivalent to £20) each. The statutes authorized the issue of 75,000 £20 bonds, to bear interest at £3 per cent., redeemable in ninety-three years by annual drawings.

Previously to 1888, the *Saragossa Company* had passed resolutions and executed a deed creating the 75,000 debentures authorized by the statutes of the company, and specially hypothecated their railway for the repayment of the debentures. Half the capital of the *Saragossa Company* had then been paid up, and 13,450 of the obligations had been issued, and the work on the first section had been begun.

A deed dated the 15th of June, 1888, was executed between the *Saragossa Company* of the one part, and *Don Joaquin Henrich* and a Spanish construction company (hereafter called the *Barcelona Company*), therein called the contractors, of the other part: whereby the contractors undertook the construction of the line and the provision of rolling-stock. The first section was to be delivered over fit for traffic in October, 1888, the fourth and fifth by March, 1889, and the second and third in September, 1890. It was provided that the contractors were to receive in payment the whole pecuniary resources of the company, including the Government subvention, the money to be received by the issue of bonds, the unpaid-up capital, and a sum of about £50,000 deposited with the Government in the nature of caution money; but as against this the line and rolling-stock were to be handed over complete to the *Saragossa Company.*

On the 13th of February, 1889, resolutions were passed by the *Saragossa Company* authorizing the issue of the 75,000, less 13,450 already issued. The bonds were to be subscribed for through

bankers in different countries in *Europe*, who were to pay the net proceeds to three *London* Commissioners, who were to hold such proceeds in trust. The 4th resolution provided that the *London* Commissioners, out of the money received by them (after retaining certain expenses and their remuneration), should set apart from time to time the moneys necessary for the payment of the interest and amortization until six months after the completion and delivery over of the line and rolling-stock, of all obligations from time to time issued, and to pay the company certain sums agreed to be paid for administration and engineers' expenses, and pay the balance to the contractors. The 7th resolution provided that in the event of its being desirable by the council to modify the contract of the 15th of June, 1888, or the proposed agreement supplemental thereto, or to substitute any other contract therefor, such amended or substituted contract should be subject to the approval of the *London* Commissioners.

On the same day, the 13th of February, 1889, a supplemental contract was executed between the *Saragossa Company* and the contractors. It referred to the resolutions of that date (which were scheduled to it), and to a proposed prospectus, and approved of and confirmed them, and provided for the issue of the obligations and application of the proceeds in accordance therewith: and the contractors thereby guaranteed to the company the due payment of the £250,000 which remained uncalled in respect of the share capital of the company, and agreed to treat such sum as part of the contract price.

A prospectus was issued on the 1st of May, 1889, inviting subscriptions for the £20 bonds at £11 gross price of issue. It contained the following statements:—

"The *London* Commissioners of the company are (in accordance with the terms of the contract of the 15th of June, 1888, and of the resolutions and contracts of the 13th of February, 1889, hereinafter mentioned) to receive the net proceeds of the obligations, to retain the amount required for payment of the interest and sinking fund of the obligations issued until six months after the completion of the line, and apply the remainder as provided in the contracts and resolutions and as hereinafter stated.

NORTH, J.
1893
COLLINGHAM v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.

"The proceeds of the present issue will be paid to the account of the *London* Commissioners (after deduction of a sum to cover all expenses of issue and the requirements of the company to date, as stated in the above supplemental contract), and as regards the proceeds of the 61,550 obligations above referred to, will be held and applied by them in providing for the service up to six months after the completion of the line of the obligations, from time to time outstanding, in providing for the expenses and remuneration of the *London* Commissioners, the expenses of the company during construction, and in paying the amounts from time to time becoming due to the contractors against the certificates of the company's engineer, as provided in the said contracts and resolutions. The issue (including 13,450 obligations belonging to the contractors under a previous contract) is made on their account, in accordance with provisions to that effect contained in the contracts mentioned in the last paragraph."

There were taken up—32,000 bonds in *Paris*, 11,829 in *London*, 450 in *Berlin*, and a small number elsewhere. The bonds produced a net price of £10 each. The proceeds of the bonds issued elsewhere than in *Paris* were handed over to the *London* Commissioners at once. The proceeds of the *Paris* bonds, amounting to £320,000 net, were paid into the *Banque d'Escompte*. Difficulties arose as to paying that sum to the *London* Commissioners, and legal proceedings were taken in *France* to enforce payment to the *London* Commissioners. After protracted litigation and a compromise, the £320,000, less reductions amounting to £9000, was paid over to the *London* Commissioners on the 2nd of January, 1892.

In the meanwhile, and in consequence of want of funds, difficulty and delay arose in proceeding with the construction of the line. The work had to be partially suspended, and for a time ceased altogether. The payment of the Government instalments were to a large extent suspended. The time for completing the railway was twice extended by the Spanish Government. On the last occasion the time for completing the first section was extended to the 8th of February, 1891, and a further period of three years was allowed for the completion of the whole line.

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By a deed dated the 14th of August, 1890, made between the *Saragossa Company* of the one part and *Henrich* and the *Barcelona Company* on the other part, the contracts then existing for the construction of the line were rescinded on terms which included the handing over of the land and railway in its then state to the *Saragossa Company*, and the assignment of the right to receive a large part of the Government subvention to the contractors. The *London* Commissioners were not parties to this arrangement. One result of this was that the uncalled capital of £250,000 was no longer guaranteed by the contractors or treated as cash; and its value as an asset depended upon how much of it could be called up and recovered from the holders of shares transferable to bearer.

An English limited company, called the *Aragon and Catalonia Railway Company*, was formed in September, 1890, by a number of the bondholders, for the purpose of acting as contractors in continuing the construction of the railway. The *Aragon Company* found some funds and continued the work down to the commencement of these proceedings; so that in January, 1892, a great part of the first section of the railway was constructed under an arrangement existing between the *Aragon Company* and the *Saragossa Company*.

The first of these actions was commenced on the 19th of February, 1892. There was then in the hands of the *London* Commissioners upwards of £250,000, that part of the proceeds of the bonds that had not been applied in the service of the loan and the construction of the works. Various sums were up to the time of trial applied, under order of the Court, in going on with the work. Mr. *Shelford*, an engineer, was sent out under order of the Court made in the first action to report as to the circumstances of the railway. He returned in May and made two reports, dated respectively the 3rd of June and the 20th of July. The result of his final report was that he recommended that the work should be suspended, that negotiations should be entered into with certain other Spanish railway companies for traffic arrangements, and with the Government for the grant of a new concession, and that, if such negotiations were successful, the first section should be completed at once, the second and

NORTH, J.
1893
COLLINGHAM v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.

third abandoned, and the fourth and fifth constructed as soon as possible.

Mr. *Dawson*, the *Saragossa Company's* chief engineer, had also made reports to the effect that the whole railway could be completed and opened for traffic without difficulty; that the resources available were nearly sufficient for the completion and equipment of the entire line; that in the interests of all concerned, the works should be carried on as fast as possible; that the first section—for which only £26,955 was required—should be completed forthwith; that the fourth and fifth sections should be finished as quickly as possible; and that while they were in progress the contracts and arrangements for the completion of the second and third should be concluded.

Mr. *Dawson* estimated the total cost, exclusive of what had already been expended, for completing the whole line and finding the necessary rolling-stock at £906,873. Mr. *Shelford's* estimate was £1,419,558. Mr. *Dawson's* estimate went in detail into the contemplated cost and the resources of the company; and stated how he proposed that such resources should be applied. The result of his figures was that even if all the unissued bonds could be disposed of at the same rate as those already sold, and the whole uncalled capital of £250,000 could be got in, there would still be a deficiency of over £81,000 to be provided for. And at the end of his estimate he added that he had not included the interest and sinking fund on obligations, or the costs of the *Saragossa Company's* administration, which would be to some extent covered by the interest on the investments in the hands of the Commissioners, and by the earnings of the first, fourth, and fifth sections, when completed.

The actions were heard on a day specially appointed by the Court. There was also before the Court, to be heard with the actions, a summons for the approval of a proposed contract between the *Saragossa Company* and the *Aragon Company* for the completion of the first section, and the construction of the fourth and fifth sections of the railway, by the *Aragon Company* at the price of the actual cost, with 15 per cent. in addition, as commission. No other contract for that part of the line, and no contract whatever for the rest of the line, was proposed.

Sir *H. Davey*, Q.C., *R. T. Reid*, Q.C., and *Macnaghten*, for *Foreign, American, and General Investments Trust Company* and other bondholders:—

Owing to misfortune, it may be, the scheme for carrying out which the bondholders have subscribed their money has become practically impossible; the evidence conclusively shews that not one shilling can be usefully expended in further work, the resources of the company are insufficient to carry out even the construction of three sections of the line. The concession could be forfeited at once; it is in so precarious a position, that it would be most unwise to depend upon it. The scheme proposed by Mr. *Shelford*, even if that be a practical business scheme, is not the scheme for which the trust was created, and any bondholder is entitled to have his proportion of the fund returned. The case is within the principles laid down by the Court of Appeal and the Law Lords in *Wilson* v. *Church* (1); *National Bolivian Navigation Company* v. *Wilson* (2).

Finlay, Q.C., and *Eve*, for the Plaintiffs in *Collingham* v. *Sloper*.

Sir *H. James*, Q.C., *S. Hall*, Q.C., and *Swinfen Eady*, for the *Saragossa Company*:—

The circumstances of this case are not within the principle of *Wilson* v. *Church*.

In the first place, the proposed scheme to the furtherance of which the bonds were subscribed in that case was wild and chimerical from the very first, and that was a substantial element in the decision especially dwelt upon by Lord Justice *James* in the Court of Appeal. In this case the scheme was reasonable and businesslike, and would have been already carried out but for the unfortunate litigation in *France*. In the second place, in *Wilson* v. *Church* nothing whatever had been done; no works had been commenced. In this case a great deal has been done: money has been spent, and a valuable property has been acquired which ought not to be thrown away.

[NORTH, J.:—That may be a reason for not dividing the funds

(1) 13 Ch. D. 1. (2) 5 App. Cas. 176.

NORTH, J.
1893
COLLINGHAM v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.

in hand without making provision for saving what can be got out of the property in *Spain.*]

The result of the evidence is that there is a valuable property; that the Spanish Government will, in their own interest, give the necessary extension of time to make the railway; that the entire railway can be constructed out of the actual resources of the *Saragossa Company*, aided by a small amount of additional capital, which can be raised when the credit of the company recovers, as it will do when the litigation ceases.

In the third place, it is only a minority—a small minority—of bondholders that seeks a return of their subscription. In *Wilson* v. *Church* (1), all the bondholders sought a return. A minority of persons who have subscribed to a certain object, who have embarked in a joint adventure, have no right to withdraw because the common expectations have not been realized: *Macdougall* v. *Jersey Imperial Hotel Company* (2). Many of the greatest undertakings have in the course of their history been apparent failures, and it is beyond the jurisdiction of the Court to speculate as to the probability of ultimate success or failure.

Cozens-Hardy, Q.C., and *Kirby*, for two of the *London* Commissioners.

C. T. Mitchell, for the third.

Abraham, for the *Aragon Company*.

Sir *H. Davey*, in reply.

NORTH, J.:—

This a case of great importance from the amount at stake. It is also one, to my mind, of great novelty; because, although the case of *Wilson* v. *Church* has certain matters in it which make it resemble the present case, yet there are very material and substantial differences between the two. It also is a case of difficulty on many grounds, but more particularly because I have had to consider one point which I have referred to inci-

(1) 13 Ch. D. 1. (2) 2 H. & M. 528.

dentally (and which I will mention again), upon which I have not had much assistance from counsel. Under those circumstances I should have been desirous, and was desirous, of having an opportunity of considering the matter fully, and of putting my reasons in writing; and, further than that, I should have liked to have had the opportunity of formulating, more exactly than I am able to do at the present moment, the exact terms of the order, the general outline of which I am now prepared to state. But there are other matters to be considered. In the first place, I cannot doubt that this is a case in which, whatever view I may take, the other side in all probability will wish to have the matter brought before the Court of Appeal; and, further, it is a case in which time is of vital importance, because it is quite clear that, whichever party is right, the sooner this case can be decided the better it will be for every one; and it is upon that ground, and considering the importance of the case and the large sum at stake, that I thought I was justified, and still think I was justified, in saying that this case should be taken out of its order, and that a time should be fixed for the hearing. Under these circumstances, I think it better to give my judgment at once.

The question here is with respect to a line of railway ascertained by recent measurements to be about 100 miles in length, lying between *La Puebla de Hijar* (or *Hijar*, as it has been called for convenience), at the north-west end, and a place on the coast of the *Mediterranean* called *San Carlos de la Rapita* at the other end. It is a line not made, or at any rate not entirely proposed to be made, for its own purposes, but as an important means of communication between existing lines of railway, by which a great traffic from other lines can be carried over this line in both directions to points beyond the terminus of this line, and I must shortly refer to the history of the line, and what has been done with respect to it. [His Lordship stated the facts; in the course of doing so he said, with reference to the contract of release of the 14th of August, 1890:—]

Now the old contracts are at an end, and at this stage there is no contract of any sort existing for the making of the line. It was said that the giving up of those contracts was a thing

NORTH, J.
1893
COLLINGHAM v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.

which the company have no power whatever to do without the sanction of the *London* Commissioners. I am not satisfied whether that is so or not; and, what is more, I know nothing whatever more than I have stated of the circumstances under which those contracts were given up. I have no means of forming any opinion whether it was or was not a desirable bargain to make. It may have been a very advantageous bargain for the company themselves. It may not; it may have been very disadvantageous to them. But it does not seem to me that the mere putting an end to the existing contract was sufficient in any way to alter the legal relations of the *Saragossa Company* and the *London* Commissioners and the obligation holders respectively to one another. It altered the chance of carrying out the work no doubt; but it did not affect their legal obligations at that moment. [After referring to the institution of these actions, his Lordship proceeded:—]

Now, the question is, what is to be done? Is it a case in which the debenture-holders or the obligation-holders are entitled to have their money returned? I agree altogether in the view put forward by Sir *Horace Davey*, that they are persons who have entered into a bargain, contained in the prospectus which they approved, and in the resolutions and in the contracts, and it is a case, therefore, in which money has been placed in the hands of trustees for the purpose of being applied to the purposes of the trust. I think it quite clear that it must be applied, if possible, for the purposes of the trust, and not in furtherance of a different scheme. The claim made proceeds on the footing that it cannot be applied for that purpose, and that therefore it ought to be returned: and there can be no doubt that if it cannot be applied for the purposes of the trust it must not be left in Court, either to remain there or to be applied in redeeming such of the obligations as may be first drawn, but ought to be divided *pari passu* among the holders of the obligations. If, on the other hand, the trust can be carried out, in that case it must be: and I do not think I am in a position to say now that the time has arrived at which no latitude can be given to the *Saragossa Company*, if they are in a position to shew, at the present time, that there is a reasonable prospect, as

a matter of business, of carrying out the railway for the purpose of constructing which this money was subscribed.

In the first place, one of the points pressed very strongly is that there has been ample time given; and it is said that the time is running out. It is a very long time since the law was passed, and it is ten years since the concession was granted; but it is not a very long time—only three years—since the obligations were issued; and the time, therefore, in that respect, is not very long. On the other hand, this has to be borne in mind—that the railway has yet to be made, and it is admitted by Mr. *Dawson* in the witness-box that to complete it according to the scheme originally proposed will require from two and a half to three years. I do not think I am going far wrong in saying that it is quite fair under those circumstances to take three years as the time it would require, and that is assuming also that the money is available for the purpose of doing it. Then, again, these obligations are repayable out of capital until six months after that time, because they are to be repayable out of capital until six months after the "completion of the line." [His Lordship shewed that the service of the loan for three and a half years would exhaust £120,000 out of the funds in the hands of the *London* Commissioners. He commented on the proposed contract—the only suggested contract—for the *Aragon Company* to complete the first section and construct the fourth and fifth sections of the railway, and continued:—]

In my opinion, though the *Aragon Company* is an honest company, formed by obligation holders in order to get over a difficulty, yet when I come to consider that they are the persons proposed to be the contractors, I must say that I do not see that they are in a position of such substance and such means that they can be looked to as furnishing by their own *status* any guarantee that even what is proposed—the limited works proposed—will be accomplished by them in the time contemplated. If we cannot look at the *Aragon Company* as sufficient of itself to carry them out, what are the means and resources available for the purpose of carrying out the contract?

Before considering that, I should perhaps deal with a matter very much pressed on me, which is this—that it is quite obvious

NORTH, J.
1893
COLLINGHAM v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.

that under no possible arrangement of any kind could the work be carried out within the period fixed by the concession, which expires in February, 1894; and, what is more, that there has been a breach of the provisions of the last extension of time already; so that at the present moment it is said this concession is *ipso facto* forfeited. As regards the position of the parties with reference to the concession, this is no doubt a very serious matter. The Government has allowed the concession to last for a very long time. Although the concession is forfeited (I am using the language of the law), it is said the Government at the present time are through their inspectors inspecting the works, authorizing the expenditure, and, what is more, they are pressing on the works with a view to their completion. Well, this statement about the pressing on of the works may mean two things: it may mean that the Government are prepared to waive all the delay that has taken place if the contract is carried on as from this date; and it may also mean this—that the Government are pressing now much more than they ever did, as shewing that the concession is forfeited, though, if great indulgence is used, and the work is pressed on vigorously, that forfeiture would not be taken advantage of. The conclusion I come to myself about it is this, that the Government are desirous of having the work done. They said from the first that it was a matter of public utility, and for their own purposes I am satisfied they would not avail themselves of their right of declaring the concession forfeited if they saw their way to getting the end they have desired accomplished—namely, the construction of this work of public utility. And it is obvious that if the present company can reasonably do it in any way, it is far more to the advantage of the Government and everybody else that they should carry it on than that the concession should be forfeited, and the Government should be allowed to take this step, and then obtain a fresh concessionaire to take up the work and begin comparatively afresh. I have not the least doubt that the Government, although they may be in a position to say it is forfeited if they please, will not enforce a forfeiture so long as they see that their own object will be accomplished—namely, the getting the work done. I have evidence of this in their allowing the work to go on, to

the cost of which they will themselves at the proper time have to contribute, because they have agreed to pay one-fourth of the estimate: and, although for reasons I entirely appreciate they have not paid the subvention, and have not been asked to make the payment, yet if in point of fact the works were completed by that company, they would have eventually to make large payments, having allowed the work to go on in the meantime.

Under these circumstances, I do not feel very much pressed by the argument that the concession has come to an end, and that what the obligation holders were entitled to was the security of the concession which was in existence, and that, because the time has expired, that in itself entitles them to the return of the money. In my opinion, that is not so; but the fact that they are in this perilous condition with the Government; that their right to the continuance of the concession is hanging in the balance; is a very important point to consider in looking to what their means are to complete the railway.

Then we come to the most important question of all, and it is a question that, in my opinion, I am bound to consider. As a matter of business—as a practical matter—can the railway be made by this company with the funds that they have—I will not say in hand, but with the available funds—with funds which there is a reasonable probability of their being able to get? I am told by Sir *Henry James* that the High Court of Justice had neither jurisdiction nor competent knowledge to form an opinion as to the resources of this company, or what it may be able to do hereafter. I agree to a great extent as to that; I feel that I am not competent to a great extent to do so; but there is one thing I think I am bound to do—to consider the question, not what the possible resources may be, but what the prospective resources at present are, and from which there can be any reasonable hope, as a matter of business, that the line could be completed. I think that is settled for me by the decision of the Court in the *Bolivian Case* (1), because, although in that case, as I have said, the circumstances were in many respects very distinguishable indeed from the present case, yet there are certain points in common. One important point of distinction is that

(1) 13 Ch. D. 1; 5 App. Cas. 176.

NORTH, J.
1893
COLLINGHAM v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.

there the concession was revoked, and in that respect I think the present case is totally different; but the Court did not proceed solely on that ground, because, if so, that would have been sufficient for the judgment; but they went to other points, and to justify the view I have taken it is necessary to refer first of all to the observations of Lord Justice *James*. Speaking of the fund, he says (1): "The purpose for which it was to be applied was the construction, completion, and equipment of the railway, and unless it is and can be so applied it must not be thrown away in making a fraction of the railway which will simply end in an impenetrable forest, a few miles from the terminus at *San Antonio*, where it will be of no earthly utility to any human being, and will produce no revenue either to the bondholders or to anybody else. They say it has become impracticable, that is, to use the expression which has more than once been used, 'in a business sense' the thing has become impracticable." (Here is the important matter.) "Now, how do the plaintiffs shew that?" And then he proceeds to deal with the various items of evidence, which, of course, depend on their own merits, and I do not go into those details. He comments first of all on the contract and the funds, and it is said the fund in hand is quite insufficient for the purpose. Then he goes on: "It is suggested, first of all, there is the property of the Navigation company. We know what that is. There is the property of the Railway company. We know what that is. We shall get £400,000 from the Brazilian Government. Now that, in truth, is the only fund as to which there is any shadow or pretence for saying that there is any possibility of its being forthcoming." He goes on to consider that among other items; and then, after considering the various sources from which the funds could be obtained, he says: "In this state of things, as it seems to me, the case is at an end. The railway cannot, in my judgment, practically be made. There are no funds forthcoming out of which it can be made; and, if we were to allow this money to leave the hands of the trustees, it would be utterly wasted in making part of a railway which would be a wreck on the surface of *Brazil*, and of no utility whatever." I now turn, without going fully into the details, to what was said in this case at great length

(1) 13 Ch. D. 45.

by Lord Justice *Cotton*. He says (1): "It was said, 'there is an existing contract for this railway, and how can you say that it is impracticable?' The existing contract is open, as has been pointed out already, to a very obvious blot. It being admitted that the £800,000 in the hands of the trustees is not sufficient for the purpose of completing the railway"; and then he goes on to deal with the question about other funds. Then he says (2): "But I think we ought not only to consider whether that contract could be carried into effect. We ought to see whether or no, by any other means, it can be said that it is practically possible to make this railway. [His Lordship then entered into a consideration of the circumstances, shewing the uncertainty as to what the total cost of the line would be.]" Then at the bottom of the page he says: "Another matter was mentioned, namely, the means and the credit of the navigation company and the railway company." Then he deals with that; and then, finally, he says: "I think I have exhausted all the means which it is said would enable the navigation company or the railway company to construct this line, and in my opinion the conclusion at which we ought to arrive is this, that, even taking the railway alone, there are not funds in hand or funds available which will enable this railway, as a matter of business, to be made." There is only one other passage I will refer to, out of many I might read for the purpose, and that is what Earl *Cairns* (then the Lord Chancellor), in giving the first judgment in the House of Lords, said (3). The passage commences with the words: "So far as time is concerned, we are now in the year 1880." He refers to the contract having come to an end, and to its not having been replaced by any contract that could be said to bind the contractors to finish the railway for a definite sum or in a definite time. Then he deals with the capital of those companies; and then he says: "It is said that the Brazilian Government would be ready to pledge its credit in order to effect a farther loan to cover this deficiency; but I do not find any evidence which satisfies me either that the Brazilian Government is bound, or has definitely agreed, to raise a farther loan, or what, if attempted to be raised, would be the result."

(1) 13 Ch. D. 61. (2) 13 Ch. D. 62. (3) 5 App. Cas. 184.

NORTH, J.
1893
COLLINGHAM v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.

Under the circumstances, it seems to me that I am not only entitled but bound, as best I can, to arrive at a conclusion as to whether there are resources forthcoming *in præsenti* or *in prospectu* out of which there is any reasonable probability, as a matter of business, that this railway can be made. There is one matter that is of rather great importance, before I go to the evidence, which is this—that the persons who are here asking to have their money back are only a very small portion of the holders of the obligations. Altogether they are a substantial proportion—they have £35,000, or something of that sort at stake; but still the proportion is very much smaller than the remainder of the obligation holders. Then out of the remainder of the obligation holders there are a great many whose views I do not know; but I have the view of a number of persons, far greater, as far as the extent of their holding goes, than those Plaintiffs, who do object to the fund being paid out and divided among the holders of the obligations, and who are desirous of having the railway prosecuted. That is a matter that, in my opinion, I ought to give great weight to. I do not say it is a question of majority or minority at all; but when I find a considerable number of persons who have money of their own at stake in the matter, and who, as far as I see, have no object on the other side to gain by wishing their money to be thrown away, the fact remains that there is a considerable number of persons, or a large preponderance of persons, who desire that the matter should be continued rather than that it should be discontinued.

But that does not relieve me from considering the position of matters; for that purpose I look to the convenient statement contained in Mr. *Dawson's* report as to the prospects of the company.

There is one matter I should mention first. It was originally contemplated that the railway would be a through railway, and all calculations of the profit to be earned were based on the assumption that the traffic would be such as a first-class railway on a through route would produce. If only three out of the five sections are completed, and two in the middle are left undone, there is an end of all hopes of through traffic. That source of

income is entirely destroyed, and all that can be relied on in the way of income is the proceeds of such local traffic as there would be from the district in which the line runs to the centres to which it would conduct. [His Lordship on the evidence came to the conclusion that change of the circumstances of other railways since the prospectus was issued did not affect the scheme to a formidable extent. On examination of the figures, his Lordship shewed that, on the assumption that the line would be completed in as short a space of time as three years, the expenses already incurred and necessary provision for the service of the loan would reduce the available sum in the hands of the *London* Commissioners to not more than £65,000; that the Government subvention being charged to the extent of £63,000, the balance required for even the three first sections was not immediately available; that the caution money would not be returned at any rate till the line was nearly completed; that the 13,000 unissued bonds could not produce anything like £10 a bond—Mr. *Dawson's* estimate; and that, looking at the fact that the *Saragossa Company's* shares were shares to bearer and other circumstances, there was no hope of being able to call up any part of the £250,000 still uncalled on the shares. He considered Mr. *Dawson's* estimate of cost of construction was nearer than that of Mr. *Shelford* to the probable cost. He said there was not the means of completing the first, fourth, and fifth sections, nothing being left for the other sections; that even on Mr. *Dawson's* own calculation there was a deficiency of £80,000 on the whole line. His Lordship continued:—]

Now, looking at that as a practical man would look at it, it is a case in which, in my opinion, there are no available sums at present in hand, or in prospect, by which the undertaking can possibly be carried out by means of the trusts constituted by the contracts and the resolutions and the prospectus.

Then it was put that the case of *Wilson* v. *Church* (1) is very different because, there was in that case a total failure of consideration. I agree there is a very great difference in that respect. I do not agree that there was a total failure of consideration, because a good deal of money had been spent; but

(1) 13 Ch. D. 1.

NORTH, J.
1893
COLLINGHAM v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.

still there was a greater failure than in the present case, because a large sum has been spent in this case, and whether it be £80,000 or £100,000, as Sir *Henry James* suggested, is not, I think, material for this purpose. I do not think the point to be decided is whether there has been failure of consideration at all. The contract cannot be treated as at an end on the ground of failure of consideration; but the question is whether the trust under which the money was deposited can or cannot be carried into effect. Then it was said, why should the money be returned if one-tenth of the work had been done? If nine-tenths of the work had been done, it is said the Court would not have thought of any return; and if there has been one-tenth done, how can there be said to be any difference so long as the whole has not been done? I am not satisfied with the proposition which assumes that if nine-tenths had been done the balance could not be returned. If nine-tenths were done it would require very much less to convince me that there were means available for the completion of the rest. But, assuming the Court had come to the conclusion that, although nine-tenths were done, it was absolutely impossible to complete the rest, and the fund available could not be applied to complete the rest, I am not prepared to admit that the Court would not do in the case where nine-tenths of the expenditure had been incurred what it would do if only one-tenth had been.

The conclusion I come to is that the obligation holders are entitled to say that there is no prospect whatever of completing the purposes of the trust, and, therefore, that the resulting trust (if that is what it is to be called) in their favour ought to have effect given to it, subject, as Sir *Horace Davey* said, to the payment of whatever are the proper charges on it which have not been satisfied. I think there is the greatest difference between this case and the *Bolivian Case* (1), according to the view the Judges before whom it came took of it; and I must say that in my opinion this case does come within the words used by Lord *Hatherley* in his judgment in that case, where he expressed a much more lenient view with respect to the company than some of the other Judges who gave opinions did. He said (2): "My own

(1) 5 App. Cas. 176. (2) 5 App. Cas. 190.

opinion is that in the present case there has been a common misfortune, the work has proved to be beyond the strength of those who undertook to perform it, there was a mistake on the part of those who engaged to enter into it, in regard to the supply of the necessary means by which alone the money could be raised, and by which alone the contract made with the public, as contained in the prospectus, could be carried into effect." I agree with what Sir *Henry James* said, and I wish to record it, that I do not find that the company or the directors have in any way deliberately departed from what was expressed in the prospectus, and it is only by reason of their being unable to carry it out further that, in my opinion, the case must be decided in favour of the Plaintiffs, who ask for distribution of the fund.

Then the question remains as to what is to be done. The right of the persons who have charges on the fund is not in dispute; but there is another matter to be considered, namely, the position of the obligation holders as a body, having regard to the security they have upon the works as they stand. The statement of claim asks for a return of the money and distribution of the remaining fund, and nothing else, and does not in terms deal with the security held for it; but I do not think I should discharge my duty in this case if I were merely to make a declaration that the parties were entitled to a return of the funds without going on further to deal with the whole matter, including the security, and particularly so for this reason: that I am not satisfied that the obligation holders have a right to have their funds returned except subject to the application of such part of them as ought properly to be applied for preventing the security becoming wholly and absolutely useless. Let me put an illustration by way of shewing my meaning, though the case is not the same. Supposing the line had been nearly completed, and that the money in the hands of the Commissioners was sufficient to complete it, but that the company themselves, who saw no benefit whatever coming to them out of the transaction, threw it up, and said they would not have anything further to do with the matter, and the obligation holders might have their money back; what would be the position of the obligation holders in that case? I think the obligation holders would have a right to say,

NORTH, J.
1893
COLLINGHAM v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.
FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.

and that any minority even of them—I do not say a nominal minority of one, but a substantial minority of them—would have a right to say, as against a greater number, that the subscription of their money and the deposit of it in the hands of the Commissioners to complete the work, which was to be their security for the repayment, did involve an obligation as between themselves that would not enable some of them to throw the undertaking or security over without doing what was necessary to realize, in the best way that could be done for the whole, what was depreciated by common misfortune; or, in other words, that some of the obligation holders in that case would have a right to say, against the wishes of the others, We will have the rest of the money subscribed applied in completing the security, to obtain which we advanced our money. Now, there is a distinction between that case and the present one in this way. In that case I am assuming that the money could be applied to complete, and would be sufficient to complete, the security contemplated. In the present case the whole fund would not suffice to complete the security contemplated; but I think that the obligation holders are entitled to say that as to the common fund subscribed for the common purpose there is such a mutuality of interest that they are entitled to have part of the fund—whatever part of the fund may be necessary—applied to make this loss by the non-completion of the railway less than it otherwise would be if the expenditure did not take place. I do not mean to say that they could enter into a different speculation—I do not mean to say that they could necessarily say, Let us complete the section to *Alcañiz*, so as to have that for our money at any rate; but, on the other hand, I think they are entitled to say, Let us have that usefully laid out under the trust that can be laid out, for the purpose of utilizing what has been spent, so as, so far as possible, to reduce the loss we otherwise should sustain; and it might be (I only put this by way of illustration), if the conclusion should be that the best way of utilising what has been spent was to complete the line to *Alcañiz*—it might be right to do that; not because it is completing part of the undertaking, but because it is incurring such an expenditure as will produce for the common benefit the best result out of the

money that would otherwise be entirely, or almost entirely, thrown away. It is this part of the case with respect to which I said I had not had much assistance from counsel. I put it early in the case—I forget exactly what the stage was, but I think I put it to Mr. *Finlay* in his opening, and certainly to Sir *Horace Davey* in his reply; and, although, he did then concede, as I understood, that his clients would take the view that I think is the right view in that respect, yet he did not give me any assistance in considering the way in which it is to be worked out. I have not, therefore, had time or opportunity of considering in what precise way, or rather by what terms of inquiry, I am to ascertain what ought to be done to prevent the total loss, or almost total loss, of what has been spent. I say "total loss" for this reason—that I am quite satisfied that, although the Government would hand over the proceeds of the sale of the work already done, yet, inasmuch as that work is on land and cannot possibly be taken away by the owners, the price to be got for it would be a very, very small price indeed.

Under these circumstances, I cannot state precisely at this moment the form of the judgment in detail which I think necessary to work out the rights of the parties. I cannot completely deal with it now, because I cannot part with the fund until such part of it as may be necessary shall be applied for what I may describe as minimizing the common loss. The only question, therefore, is what is to be done. My view about it (I am not expressing it in formal terms) is, that there should be a declaration that the works cannot be carried out, and that the obligation holders are entitled to have their money back, subject, first of all, to providing for all charges and liabilities properly attaching to the fund, and, secondly—and this is the important matter—to considering in what way I can best apply, or whether I can usefully to any extent apply, the money remaining for the purpose of realizing the security in the best manner possible.

I know of what importance time is, and suggest for the consideration of the parties that counsel should prepare the declarations and the forms of inquiry that they propose I should make to give full effect to my decision. I cannot dictate this now. I should have to look more closely into the papers than I can at

NORTH, J.

1893

COLLINGHAM v. SLOPER.

FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.

FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY v. SLOPER.

the present moment; and I think that, considering the great object of saving time which we all have in view—and for that reason I have given my judgment off-hand—it is very desirable that counsel should sketch out the minutes of the forms of declaration and inquiry that they think right.

Jan. 27. The actions were mentioned, and the minutes of judgment printed below discussed and settled: and the costs of the actions were dealt with and disposed of.

MINUTES OF JUDGMENT.—Declare that the trusts constituted by the contracts of the 15th of June, 1888, and the 13th of February, 1889, and by the resolutions of the *Saragossa and Mediterranean Railway Company* passed on the 13th of February, 1889, and by the prospectus issued by the Defendant company in the month of May, 1889, all in the pleadings mentioned, ought, so far as they can be performed, to be carried into execution under the direction of the Court.

And declare that, subject to the payment of any charges on the funds subscribed by the Plaintiffs and the other holders of 3 per cent. obligations issued by the *Saragossa Company*, and to any payments which may be certified to be properly payable thereout, and to the payment of any costs directed to be paid thereout, the said fund is (in the events which have happened) divisible rateably amongst such of the holders of the said obligations as are entitled to the benefit of the same; and that no part of the said fund is to be applied in payment of any such obligation holders in priority, except in respect of obligations which have already been drawn, but have not been paid, and interest which has already accrued due and become payable, but has not been paid.

And declare that the Plaintiffs and the other holders of the said obligations are entitled to a charge on the railways and property comprised in or charged by the said obligations, and the trust deed, dated the 6th of October, 1887, for securing the same.

Tax the costs of the Plaintiffs and Defendants of the above-mentioned actions on the higher scale, including the costs, charges, and expenses of the Defendants *Sloper*, *Robinson*, and *Wilde* properly incurred by them as between solicitor and client, separate sets of costs to be allowed to the Defendants *Sloper* and *Robinson*, and to the Defendant *Wilde*.

And let the Defendants *Sloper*, *Robinson*, and *Wilde* pay and retain such costs, when taxed, out of the funds in their hands.

And let the following inquiries be made, viz.:—

(1.) An inquiry what obligations have been issued by the *Saragossa Company* and which of them are now outstanding and entitled to the benefit of the trust constituted as aforesaid.

(2.) An inquiry what sums have come to the hands of the Defendants *Sloper*, *Robinson*, and *Wilde*, or any of them, representing moneys subscribed in respect of the said obligations, and what portions of such sums are now in

their hands; and let the Defendants *Sloper*, *Robinson*, and *Wilde*, in answering such last-mentioned inquiry, make a statement, to be verified by affidavit, of all disbursements made by them, and any of the parties are to be at liberty to apply with respect to any sum appearing to have been received by the said Defendants, or any of them, and not now in their hands.

(3.) An inquiry of what particulars the sums subscribed in respect of the said obligations, which have not been received by the said last-mentioned Defendants, now consist, and whether any and what steps ought to be taken to recover any part thereof which may appear to be outstanding.

(4.) An inquiry what charges or incumbrances, other than the said obligations, affect the railways and property of the *Saragossa Company*, comprised in or charged by the said obligations or the said deed, including any property acquired for the purpose of the railways which has been or ought to be paid for by means of the funds subscribed by the Plaintiffs and the other holders of the said obligations.

(5.) An inquiry whether any and what steps should be taken for the purpose of realizing, for the benefit of the Plaintiffs and the other holders of the said obligations, the railways, works, lands, rolling-stock, and other materials acquired for the purpose thereof; and, in prosecuting this inquiry, regard is to be had to the question whether any further expenditure should be made out of the said fund in completing and equipping the first section of the said railway or any part thereof.

(6.) An inquiry whether any other and what sums are properly payable out of the said fund.

Reserve further consideration.

Solicitors for Plaintiffs in *Collingham* v. *Sloper*: *Huxham & Rawlinson.*

Solicitors for Plaintiffs in the other actions: *Slaughter & May.*

Solicitors for two Commissioners: *Norton, Rose, Norton & Co.*

Solicitors for third Commissioner: *Wilkins, Blyth & Co.*

Solicitors for *Saragossa Company*: *Francis & Johnson.*

Solicitors for *Aragon Company*: *Bompas, Bischoff & Co.*

D. P.

NORTH, J.

1891
Nov. 10, 11, 12;
Dec. 8, 9.
1893
Feb. 2, 7, 8.

BENTINCK *v.* LONDON JOINT STOCK BANK.

[1888 B. 3014.]

Banker—Loan to Broker—Deposit of Customer's Securities by Broker—Authority of Broker to Pledge—Bonâ fide Holder for Value—Notice—Estoppel—Stock Exchange—"Contango" Transactions.

Stockbrokers were employed by a client to make for him from time to time on the *London Stock Exchange* speculative purchases and sales of stock, shares, and bonds. The brokers furnished him with money to enable him to pay for the purchases, and he authorized them to hold the purchased stocks, shares, and bonds as security for their advances, and also to repledge them.

The brokers had a loan account with their bankers, with whom they deposited stock, shares, and bonds belonging to various clients *en bloc*, as security for the bankers' advances. The bank allowed the brokers to withdraw the deposited securities from time to time, as they required them, upon their depositing others of equal value. Ultimately, the brokers became defaulters on the *Stock Exchange*, and were adjudicated bankrupts. At the date of the default there were in the hands of the bank various stocks and shares, and also some bonds payable to bearer, which the brokers had purchased for the client. The stocks and shares were transferable by deed in the ordinary way, and they had all been transferred to, and were registered in, the names of trustees for the bank. Some of the transfers were made by the client himself, some by the brokers, and some by third parties. Those which were made by the client were expressed to be for a nominal consideration; the others were expressed to be for full value. The bonds passed by delivery on the *Stock Exchange*, and were always there treated as negotiable.

The client claimed to be entitled to redeem the securities on paying to the bank the amount which was due from himself to the brokers; the bank claimed to hold the securities until payment of a larger amount which was due to them from the brokers. The client asserted that the authority which he had given to the brokers to repledge his securities authorized them to do so only for an amount not exceeding what was due from himself to them.

There was evidence that the majority of transactions on the *Stock Exchange*, when the purchaser of securities does not pay for them at once, is carried on upon a system known as "contango," or "continuation," under which the person who provides the purchase-money becomes the owner of the purchased stock or shares, he entering into a contemporaneous contract with the purchaser to sell to him at a future day (generally the next "account day" on the *Stock Exchange*) an equal amount of similar stock or shares at the original price, increased by a charge called the "contango":—

Held, upon the evidence, especially having regard to that relating to the

"contango" system, that there was nothing to lead the bank to suppose that the stocks and shares which were transferred to their trustees were not the brokers' own property; and that the bank must therefore be treated as *bonâ fide* holders for value without notice, and their legal title could not be impeached; and that, consequently, the client could not redeem without paying the amount which was due from the brokers to the bank:

Held, also, that as to the stocks and shares of which the client had himself executed transfers, he was estopped from denying that the brokers had authority to pledge them to the bank for their full value:

Held, also, that the bonds were negotiable securities, and that as to them the case was governed by *London Joint Stock Bank* v. *Simmons* (1), and that the client could not redeem without paying the amount due from the brokers to the bank.

It being admitted that the amount due to the bank exceeded the value of the client's securities, an account was not asked for.

TRIAL OF ACTION.

The action was brought for the redemption of various railway and other stocks and shares, and bonds which had been purchased for the original Plaintiff by his stockbrokers, Messrs. *Herapath, Delmar & Co.*, and which he had authorized them to hold as security for moneys advanced by them to him to enable him to effect the purchases. The brokers had deposited the Plaintiff's securities (together with other securities not belonging to him), with their bankers, the *London Joint Stock Bank*, as security for advances made by them to the brokers. The Plaintiff claimed to be entitled to redeem his securities on paying to the bank the amount due from him to the brokers. The bank claimed to be entitled to hold the Plaintiff's securities until payment of the amount due from the brokers to them, which amount considerably exceeded that which was due from the Plaintiff to the brokers.

The business of stockbrokers was originally carried on by *Spencer Herapath* alone in his own name. In March, 1884, he died, and the business was then carried on by his son, *Spencer John Herapath*, and *William Booker*, in partnership, under the firm of *Spencer Herapath & Co.* In November, 1886, *Booker* died; and in February, 1887, *S. J. Herapath* took *Algernon Frederick Delmar* into partnership with him, and thenceforward the business was carried on by them in partnership under the firm of *Herapath, Delmar & Co.*

(1) [1892] A. C. 201.

NORTH, J.
1893
BENTINCK
v.
LONDON
JOINT STOCK
BANK.

The original Plaintiff, the Right Hon. *G. A. F. Cavendish Bentinck*, had for many years employed *Spencer Herapath*, and his successors in business, as stock and share brokers.

In the year 1888, and for many years previously, he employed them in speculative purchases and sales on the *Stock Exchange*, of stocks, shares, and bonds of railway and other companies. The arrangement between him and the brokers was, that they should from time to time advance the moneys required for the purchases, and charge the Plaintiff ½ per cent. above the rate which might be charged to themselves by their bankers or other persons from whom they should obtain the money, the interest charged to the Plaintiff being never less than 4 per cent., and that the Plaintiff should give to the brokers cover for their advances to him, and that they should be at liberty to retain the stocks and shares so purchased as security for the advances made by them to him. This arrangement was carried out by *Spencer Herapath* and his successors in business, the money required for purchasing and taking up the stocks, shares, and bonds purchased on the Plaintiff's behalf being from time to time lent by the brokers to him. In order to enable them to make these advances, and for other purposes, the brokers from time to time borrowed money from their bankers, the *London Joint Stock Bank*, depositing with them as security for their advances various stocks, shares, and bonds, some of which had been purchased by the brokers on behalf of the Plaintiff, and others had been purchased by them for or were the property of other clients of the brokers. The securities thus deposited were deposited *en bloc*, and were treated in the books of the bank as the property of the brokers who made the deposit, a loan account being opened in their names. The moneys advanced by the bank were from time to time carried to the current account of the brokers. The securities deposited with the bank were from time to time withdrawn by the brokers as they required them for their clients, other securities being substituted so as to keep up the security to the amount required by the bank.

On the 15th of June, 1888, the firm of *Herapath, Delmar & Co.* were declared defaulters on the *Stock Exchange*, and they were soon afterwards adjudged bankrupts.

At the date of the default, various stocks and shares of railway and other companies, which had been purchased by the brokers on behalf of the Plaintiff, were in the hands of the bank as security for advances made by them to the brokers. These stocks and shares had been all transferred to and registered in the names of trustees for the bank. In some cases the transfers were made by the brokers themselves, and in other cases by third parties, and in all those cases they were expressed to be made in consideration of full value. In other cases the transfers were made by Mr. *Bentinck* himself, and were expressed to be made in consideration of the nominal sum of 5*s*.

There were also at the date of the brokers' default in the hands of the bank some bonds of the *New York, Pennsylvania, and Ohio Railroad Company* (commonly known as *Atlantic* First Mortgage Bonds). By each of these bonds the railway company acknowledged itself indebted unto a named person, "or to the registered holders, or if unregistered to the bearer hereof," in a specified amount, which the company promised and agreed to pay "to the registered holder, or if unregistered to the bearer hereof," on a day named, and also to pay interest until repayment at a rate mentioned, on presentation of coupons attached to the bond. Each bond contained the following clause:—

"The holder of this bond may at any time, on payment of the fee established therefor, have the same registered, under such regulations as the company may establish, in his name, or the name of any nominee or nominees, on the books of the company at *New York*, or such other place or places of registration as the company may designate, and such registration may from time to time, on complying with such regulations, be extinguished and cancelled, and again renewed; but, after such registration, and while the same remains unextinguished and uncancelled, this bond can only be transferred by the registered holder, his duly authorized agent or lawful successor in title, by a proper entry of transfer on the books of the company, and an advertisement of such transfer on the bond. Due extinguishment and cancellation of registration stamped or indorsed on the bond of the company will restore the negotiability thereof."

NORTH, J.
1893
BENTINCK v. LONDON JOINT STOCK BANK.

These bonds had been purchased by the brokers on behalf of the Plaintiff, and had been deposited by them with the bank as security for advances made by them to the brokers. The bonds had not been registered.

By his statement of claim, the Plaintiff alleged that *Herapath, Delmar & Co.* had power to transfer to the bank the benefit of the security they had from the Plaintiff, on the shares, stock, and bonds on which they had made advances to him, to the extent of such advances; but that he never gave them authority to pledge any of the shares, stock, or bonds on his behalf, or to create by transfer or otherwise any security upon them for any amount in excess of what should from time to time be owing from him to the brokers. The Plaintiff also alleged that the bank, through their officers and managing directors, were throughout aware that the securities deposited with the bank and transferred to their officers mainly, if not entirely, belonged to clients of the brokers, and were not the property of the brokers.

The Plaintiff claimed a declaration, that he was on the 15th of June, 1888, entitled to redeem the stocks, shares, and bonds which had been purchased by the brokers on his behalf, and which were on that day in the hands of the bank, on payment of the amount then due from him to the brokers; and redemption of the same on that footing.

By their statement of defence, the bank asserted that the bonds of the *New York, Pennsylvania, and Ohio Railroad Company* had always been treated on the *Stock Exchange* and elsewhere as negotiable instruments transferable by delivery. And the bank said that they took all the securities in question in the action in good faith and for value, and that they became and were the lawful holders thereof as *bonâ fide* purchasers for value, and without notice of the title or rights asserted by the Plaintiff in relation thereto, or of any fact or circumstance inconsistent with the title of the bank. And they denied the Plaintiff's allegations as to notice.

The action came on for trial on the 10th of November, 1891. Evidence was taken on the 11th and 12th of November, and on the 8th and 9th of December. The evidence was then closed,

and the further hearing was adjourned until after the House of Lords should have given their decision upon the appeal of the bank against the decision of the Court of Appeal in *Simmons* v. *London Joint Stock Bank* (1). The decision of the House of Lords was given (2) on the 4th of April, 1892, reversing the decision of the Court of Appeal. The further hearing of the present case took place on the 2nd, 7th, and 8th of February, 1893.

Before the trial of the action commenced the Plaintiff had died, and the action was continued by his personal representatives. At the trial evidence was given by Mr. *Ernest Carey Grant*, who had been the official assignee of the *London Stock Exchange* for fourteen years. He said that much the greater part of the transactions on the *Stock Exchange* is carried on upon a system known as "contango," or "continuation." Under that system the broker or other person (called the "taker in") who advances the money to enable the purchaser of stock, shares, or bonds, to pay for what he has purchased, becomes himself the purchaser and absolute owner of the stock, shares, or bonds purchased, he at the same time entering into another contract to sell to the original purchaser, generally on the next account day on the *Stock Exchange*, an equal amount of the same description of stock, shares, or bonds at the original price of purchase, with the addition of a charge called the "contango." The stock or shares are transferred into the name of the broker or his nominee. The witness said that in transactions of this kind, when the broker deposits the stock, shares, or bonds thus acquired by him with his bankers as security for advances made by them to him, there would be nothing to indicate to the bankers that the securities so deposited were not the broker's own property.

Similar evidence was given by Mr. *Thomas Wilde Powell*, who had been a member of the *Stock Exchange* for forty years. There was also evidence that the bonds of the *New York, &c., Company* if unregistered always pass on the *Stock Exchange* by delivery from hand to hand.

The effect of the evidence generally is stated in the judgment of the Court.

(1) [1891] 1 Ch. 270. (2) [1892] A. C. 201.

NORTH, J.
1893
BENTINCK v. LONDON JOINT STOCK BANK.

Rigby, Q.C., *Cozens-Hardy*, Q.C., and *Grosvenor Woods*, for the Plaintiffs:—

The present case resembles *Earl of Sheffield* v. *London Joint Stock Bank* (1). In that case the securities had been deposited with the bank by a money-lender, while in the present case the deposit was made by stockbrokers; but the same principle applies. In *Simmons* v. *London Joint Stock Bank* and *Little* v. *London Joint Stock Bank* (2), it was held that, when brokers had, without their clients' authority, deposited his securities with the bank to secure advances made by them to the brokers, the client was entitled to recover from the bank the value of the securities. Every point of law which now arises was decided by these cases in favour of the plaintiffs. The law thus decided is in favour of the present Plaintiffs, and they have only to shew that the securities which they now claim were in fact the property of *Bentinck*, and what was the amount due from him to the brokers. They will then be entitled to redeem the securities on paying that amount to the bank. It is immaterial whether the securities are or are not negotiable, for the result of those decisions is that, if the bank had notice that the securities deposited with them by the broker, or some of them, might not be the broker's own property, they cannot take advantage of the deposit beyond the extent of the broker's authority to make it, and the *onus* is on the bank to shew the extent of that authority. The bank ought, from the course of dealing, to have known (whatever they, in fact, believed) that the securities were not, or might not, all be the brokers' own property—that the brokers were dealing with them in the course of their business as brokers. The bank only say that they had a right to believe that the brokers had authority to deal with the securities. They admit that they never inquired; but they say that it would have been of no use to do so, for, if the brokers were honest, they would not have acted without authority, and, if they were not honest, they would not have hesitated to tell a lie. It is, however, sufficient to say that the circumstances were such as to put the bank on inquiry.

(1) 13 App. Cas. 333. (2) [1891] 1 Ch. 270.

[The evidence given by the officers of the bank in the former cases was read as part of the evidence in the present case.]

Sir *H. Davey*, Q.C., *Finlay*, Q.C., and *W. D. Rawlins*, for the Bank:—

It is a question of fact in every case, whether persons in the position of the bank, lending on securities such as these, have implied notice that they are not, or may not be, the absolute property of the lender. That is really the principle on which *Earl of Sheffield* v. *London Joint Stock Bank* (1) was decided; and the principle is recognised in *Simmons* v. *London Joint Stock Bank* (2). The latter case differs from the present, for there there was a question of fraud; here, there was implied notice. The bank were not dealing with the brokers on the footing that the brokers were agents to borrow money. The evidence shews that the surrounding circumstances were such that the officers of the bank had every reason to believe, and did, in fact, believe, that the securities pledged belonged to the brokers themselves; and for this purpose the evidence as to the practice of brokers on the *Stock Exchange* in dealing with their clients in "continuation" or "contango" transactions is material, as shewing that the brokers in such transactions become the absolute owners of the property bought. This was recognised by the Court of Appeal in *Bongiovanni* v. *Société Générale* (3). This distinguishes the present case from *Earl of Sheffield* v. *London Joint Stock Bank*, where the intermediary was a money dealer whose regular business was known by the bank to be lending on securities which he pledged over again.

In the next place, it is clear that the brokers had authority from *Bentinck*, to some extent, to borrow on his securities. The Plaintiffs have not shewn, and in order to succeed they must shew, that that authority was limited. And, if there were a limit to the authority, that cannot effect the bank, who had no knowledge of the limit: *Perry-Herrick* v. *Attwood* (4). There being two innocent parties, *Bentinck*, who put it in the power of the brokers to give the legal interest in the securities to the bank's

(1) 13 App. Cas. 333.
(2) [1891] 1 Ch. 270.
(3) 54 L. T. (N.S.) 320.
(4) 2 De G. & J. 21.

NORTH, J.
1893
BENTINCK v. LONDON JOINT STOCK BANK.

trustees, ought to bear the loss: *Swan* v. *North British Australasian Company* (1).

The effect of the evidence as to "contango" business on the *Stock Exchange* is to rebut any presumption that the bank in taking securities from a broker must have known that they were not, or might not, be his own property. As so large a proportion of the business on the *Stock Exchange* is carried on upon the "contango" system, the strong probability would be that, when a broker took a number of securities to a banker in order to obtain an advance of money upon them, they were his own property, and there would be nothing to put the banker upon inquiry as to the broker's authority to deal with them. In *London Joint Stock Bank* v. *Simmons* (2), the House of Lords explained their decision in *Earl of Sheffield* v. *London Joint Stock Bank* (3). They said that it did not lay down any general law, but was only a decision upon the particular facts, from which in that case they drew the inference that the bank in fact knew that *Mozley* (the money lender) was pledging his clients' securities to them without their authority. *Simmons' Case* decides that the mere fact that a stockbroker deposits securities with a bank is not notice to the bank that he is acting dishonestly. In order to deprive the bank of the legal title to securities acquired in that way, it must be shewn that they had notice of something which should have led them to suspect dishonesty, and made it their duty to inquire. It has been suggested that a pledge by a broker of securities belonging to different clients *en bloc* stands on a different footing; but *Simmons' Case* shews that it does not. The practice of depositing securities in this way *en bloc* is a convenience to the client, for by means of it money can be obtained at once when the client requires it, and the broker can obtain it on easier terms than the client could himself: *Foster* v. *Pearson* (4). If the broker has authority to pledge the securities for their full value, it can make no difference whether they are deposited *en bloc* or not. The question of notice is one of fact, not of law. In the present case there is no evidence that the bank had notice that the brokers were pledging the

(1) 2 H. & C. 175.
(2) [1892] A. C. 201.
(3) 13 App. Cas. 333.
(4) 1 C. M. & R. 849, 859.

securities without authority, or that it was not part of *Bentinck's* contract with the brokers that they might pledge his securities in the way in which they did pledge them. In many cases he himself transferred the stocks and shares into the names of the bank's trustees, and they were registered in their names, and in those cases, at any rate, he was, and his representatives are, estopped from denying the title of the bank: *Goodwin* v. *Robarts* (1); *Colonial Bank* v. *Cady* (2). If a fraud was committed on *Bentinck* by the brokers (which we do not admit), he, who placed the confidence in them which they abused, ought to suffer the loss rather than the bank, who dealt with the brokers in the ordinary course of business without notice of any fraud. In *Cooke* v. *Eshelby* (3), it was held that a purchaser from an agent had knowledge that the vendor might be acting as agent for an undisclosed principal, and that he was bound to inquire in what character the vendor was actually selling, and that, as he did not do so, he could not set-off against the principal a debt due to him by the agent. *Simmons' Case* (4) is an express authority only as to negotiable securities; but as regards notice it in principle covers the present case. It shews that the mere fact that a man who pledges securities with a bank is a money dealer is not notice to the bank of a possible infirmity in his title. It shews that, even if there were such a doctrine in the case of a money dealer, it does not extend to a stockbroker. It shews also that notice is a question of fact in each case. And it is clear from the judgments of the noble Lords, especially those of Lord *Herschell* and Lord *Field*, that the mere fact that the securities of different clients are pledged by a broker *en bloc* as security for advances to himself is not sufficient to put the lenders on inquiry as to the extent of his authority, or to affect them with notice that his authority may be of a limited character. In the present case the evidence shews that the bonds payable to bearer are negotiable.

[*Cozens-Hardy*:—I admit that they are negotiable.]

There is nothing to shew any want of good faith on the part

(1) 1 App. Cas. 476.
(2) 15 App. Cas. 267.
(3) 12 App. Cas. 271.
(4) [1892] A. C. 201.

NORTH, J.
1893
BENTINCK v. LONDON JOINT STOCK BANK.

of the bank, and, that being so, the decision in *Simmons' Case* (1) applies. The evidence as to the "contango" system proves that under it the person who advances the money to pay for the stock or shares becomes the owner of them—that it is not really a loan transaction, though it may be generally so called, but a sale and repurchase, and so the Court of Appeal held in *Bongiovanni* v. *Société Générale* (2). The known existence of this system justified the bank in supposing that the securities offered to them by the brokers were the brokers' own property. As to the stocks and shares which passed by transfer and registration, the case is even stronger in favour of the bank than that of the negotiable bonds. They acquired a legal title, and there is nothing to shew that they had notice of anything wrong. *Hone* v. *Boyle* (3) is very like the present case. Indeed, the present case is stronger in favour of the bank, for there the certificates of the shares were indorsed with a transfer in blank, no intention being shewn that they should pass to any particular person; whereas here *Bentinck* must have intended that the stocks and shares of which he himself executed transfers to the bank's trustees should pass to them: *Marshall* v. *National Provincial Bank of England* (4). As to the stocks and shares which were transferred to the bank's trustees by third parties, it must be assumed that, if they belonged to *Bentinck*, he had given authority to the brokers to deal with them as they did. As to those stocks and shares which were transferred by *Bentinck* himself to the bank's trustees, even if the fact that the transfers were made for a nominal consideration can be said to be notice that *Bentinck* was the beneficial owner, still he, by his own conduct in transferring all his interest to the bank's trustees, is estopped from denying their title. He trusted his agents, the brokers; and, even if their authority was in fact limited, he is estopped from denying that they had authority to deal with the securities as they did: *Perry-Herrick* v. *Attwood* (5). *Bentinck* either executed transfers, or directed that transfers should be executed, to the bank's trustees for the purpose of raising money, and placed them in the hands of the

(1) [1892] A. C. 201.
(2) 54 L. T. (N.S.) 320.
(3) 27 L. R. Ir. 137.
(4) 40 W. R. 328.
(5) 2 De G. & J. 21.

brokers, there being nothing to shew any limitation of their authority as to the amount to be raised. The bank took the securities in the ordinary course of business, without any notice of any defect in the title of the brokers, and *Bentinck* was estopped from denying their title.

Sir *J. Rigby*, S.G., in reply:—

The evidence as to "contango" was introduced after the pinch of the case had become known. The utmost effect of it is, that it might have justified the giving of positive evidence that the officers of the bank did in fact believe that the several securities brought to them by the brokers were their own property. After the decision of the House of Lords in *Simmons' Case* (1), I cannot deny that the bank are entitled to the negotiable securities. The point of that decision was, that the *Cedula* Bonds were negotiable, and the question was simply whether those negotiable securities had come to the hands of the bank under circumstances consistent with honesty. In the present case the question is very similar to that in *Earl of Sheffield's Case* (2).

[NORTH, J.:—I do not see how the question of "contango" could have been raised there.]

The question as regards the non-negotiable securities is, Did the bank really believe that they belonged to the brokers? *Perry-Herrick* v. *Attwood* (3) has no application to the present case; the mortgagee in that case had no reason to think that there was any limit to the power of the person who was dealing with him over the property. *Hone* v. *Boyle* (4) related to one isolated transaction.

We are entitled to assume that the brokers represented to the bank that the securities were either their own or securities which they had power to pledge, and such a representation would be sufficient to put the lenders on inquiry as to the extent of the borrower's power.

The case of the Plaintiff, as regards the securities transferred by him to the bank for a nominal consideration, is stronger than as regards the securities transferred for apparently full

(1) [1892] A. C. 201.
(2) 13 App. Cas. 333.
(3) 2 De G. & J. 21.
(4) 27 L. R. Ir. 137.

NORTH, J.
1893
BENTINCK
v.
LONDON
JOINT STOCK
BANK.

value. If the officers of the bank had inquired of Mr. *Bentinck*, and had found the real state of the case, they would have been put on inquiry as to the other securities.

NORTH, J.:—

The material facts of the case are shortly these: there was a well-known firm of stockbrokers in the City, *Spencer Herapath* and his successors in business, and for many years past he and his successors had dealings with the *London Joint Stock Bank*, the Defendants, and a loan account opened with them. The copy put in evidence of this loan account goes back only to the year 1881; but in it the large balance of £28,000 is brought forward, and no doubt the business had been going on much earlier than that.

The business of stockbrokers was carried on, first, by *Spencer Herapath* alone, but, in the course of time, he took into partnership with himself his son, *Spencer John Herapath*, and a Mr. *Booker*. No change was made in the firm name until, on the 13th of March, 1884, *Spencer Herapath* died. The business was carried on by *Spencer John Herapath* and *Booker* together down to the time of *Booker's* death in November, 1886, under the firm of *Spencer Herapath & Co.*, and after *Booker's* death *Spencer John Herapath* carried it on alone, but in the same name, down to February, 1887, when he took Mr. *Delmar* into partnership with him; and from February, 1887, for nearly a year and a half, the business was carried on under the name of *Herapath, Delmar & Co.* Nothing was said, or could have been said, against the firm down to the time when *Delmar* became connected with it; but the dealings from that time forward attributed to Mr. *Delmar* were of such a nature that, upon the 15th of June, 1888, the firm failed, and it has become matter of history that in certain cases *Delmar* had fraudulently dealt with securities held by the firm for some of their clients. I refer to *Simmons* v. *London Joint Stock Bank* and *Little* v. *London Joint Stock Bank* (1). Securities which had been paid for by the clients, and, therefore, belonged to the clients, were

(1) [1891] 1 Ch. 270.

pledged in the name of the firm for moneys advanced to the firm.

The Plaintiff, Mr. *Bentinck*, had large dealings with the firm from a very early date. His business was conducted with the successive firms down to the time when the last firm failed. The position of matters between him and the firm is thus stated in paragraph 4 of the statement of claim: "Purchases of shares in South American undertakings were in the first instance made on behalf of the Plaintiff on the recommendation of *Spencer Herapath*, and it was then arranged between them that *Spencer Herapath* should advance the moneys required for such purchases, and charge the Plaintiff ½ per cent. above the rate which might from time to time be charged to *Spencer Herapath* by the bank or other source from which he obtained the money, the rate charged to the Plaintiff, however, being at any time not less than 4 per cent., and that *Spencer Herapath* should be at liberty to retain the stocks and shares so purchased as security for the advances to be so made by him to the Plaintiff. In pursuance of this arrangement, the amounts required for purchasing and taking up and paying, for on Plaintiff's behalf, stocks and shares in South American undertakings were from time to time lent by *Spencer Herapath* to the Plaintiff, and the same arrangement was, after *Spencer Herapath* took other persons into partnership with him and after his death, continued between the Plaintiff and the successive firms." Then, in paragraph 10, it is alleged that: "The firm of *Herapath, Delmar & Co.* had power to transfer to the bank, or any other bank, firm, or persons, the benefit of the security they had from the Plaintiff on the shares, stock, and bonds on which they had made advances to him to the extent of such advances." That allegation relates to *Herapath, Delmar & Co.*; but I take it that all the firms had the same authority which is there admitted to the extent of their advances. Mr. *Bentinck* had, as I have said, for a long time dealings with these firms to a very large amount, the amount of stock dealt with being very considerable. The Plaintiff himself took an active interest in the matter, and, to facilitate the dealings between him and the firms, some books, which I may call pass-books, were kept for his use. I call them pass-books, because

NORTH, J.
1893
BENTINCK v. LONDON JOINT STOCK BANK.

they were small portable books, and those which were produced in Court were either exactly or very nearly transcripts from the accounts between *Bentinck* and the firms in their ledgers. The last of them, commencing in November, 1886, and continuing down to the time at which the failure of the stockbrokers' firm took place, is now before me, and it shews very large dealings between the parties. There is also the evidence of Mr. *Aylard*, who was a clerk of the firm during the five years or thereabouts before they failed, that these books were prepared and kept for the purpose of being shewn to Mr. *Bentinck*; that he from time to time came to the office, asked to see them, and looked at them. He was seen to look at them and to read them, and, though Mr. *Aylard* says that he never asked for any explanation from him, yet in the ordinary course of business, which I presume was followed, he would ask for information, if he thought any was necessary, on looking at this convenient form of his account with the firm. All these transactions were of a very speculative nature, and it is evident from the course of business between him and the brokers that his purchases were not made as investments, but were mere dealings in stocks or shares with the view of making money out of the transaction of buying and selling, and he had considerable experience in these matters. The book was made out fortnightly, and the accounts were entered in it fortnightly. For instance, the first entry in this book is the 15th of December. The next is the 30th of December. The next is the 13th of January. The next is the 27th of January, and so on, shewing obviously that the accounts were made up with reference to the fortnightly settling days on the *Stock Exchange*. Then Mr. *Aylard* says that money was borrowed from the bank in the ordinary course of business for the purpose of these dealings with stocks and shares, and each of these accounts shews from the commencement of the fortnightly account a large quantity of stocks and shares of various kinds held in hand, which in the first account are put down at £18,500. That is as of the 24th of November; and then as of the 13th of December, there appear on the other side loans on the same stock to the amount of £18,500. The result of the transactions is, that *Bentinck* had from time to time an interest in large quantities

of stocks and shares, and the claim now made is to redeem from the bank securities deposited with them by *Herapath, Delmar & Co.*, or their predecessors, which it is alleged belonged to *Bentinck* and now to his executors. A *primâ facie* title has been shewn to some of the stocks and securities claimed. As to the rest, I could not investigate the title to them in Court; it would have (if necessary) to be made the subject of inquiry. But for the present purpose it may be taken that there is a large unascertained amount of securities held by the Defendants in which the Plaintiffs have some right of redemption. In fact, their right to redeem is not disputed by the Defendants, if they will pay the amount which the Defendants say is due to them upon the security. These stocks, shares, and securities have come into the possession of the Defendants by being deposited with them by *Herapath, Delmar & Co.* They are divisible under three heads. The first head is securities which are negotiable, as to which I need not say any more now, because, although the title to them, and the question whether they are negotiable, was much in contest when the present case was opened, yet, having regard to the observations in the House of Lords in *Simmons' Case* (1), and to the evidence given in the present case, there can be no doubt that they are negotiable securities, and, indeed, this was admitted by the Solicitor-General in his reply. The other securities are all transferable by written instruments, and they have all been transferred to and are now standing in the names of two trustees for the bank, who hold them for the bank. The only difference between these securities *inter se* is, that some of them were actually transferred by the Plaintiff *Bentinck* himself to the bank's trustees. The rest of the securities were transferred, not by *Bentinck*, but by other persons, some by members of the successive firms of stockbrokers, *Booker*, for instance, and *Herapath*, and others by third persons, who may for this purpose be called outsiders. The Plaintiffs seek to have all these transferred to them on payment of what is due from their testator to the stockbrokers' firm, alleging that, though the stockbrokers had power to pledge his securities for what had been advanced to him, they could not go any further. The bank, on

(1) [1892] A. C. 201.

NORTH, J.
1893
BENTINCK v. LONDON JOINT STOCK BANK.

the other hand, claim to hold the securities to secure the money which they advanced to the brokers upon them. Instead of the £13,000 or thereabouts, which the Plaintiffs admit to be due, the bank claim something like £50,000.

The first question is, How is it shewn by the Plaintiffs that what has been done with respect to these transfers was done without the authority of the true owner? Because if it was done with his authority there is an end of all question. How is it shewn that it was done without his authority? Now, as regards that, there is a very important blank in the evidence. Mr. *Bentinck* himself is not forthcoming, because he died before the trial of the action, although he was living when the action was commenced. His evidence, therefore, is unfortunately wanting through no fault of any one. *Delmar* has disappeared, and no other person is to blame for his absence. But *Spencer John Herapath* is alive and is in this country, and he, I have no doubt, could have given very important evidence as regards the relations which subsisted between his firm and Mr. *Bentinck*. It cannot be taken for granted that the firm committed a fraud upon Mr. *Bentinck* unless there is some evidence of it, especially when the unblemished reputation of the firm for so many years is taken into consideration. As against that, no doubt, must unfortunately be set the character which the firm was found to have gained when *Delmar's* delinquencies were ascertained. But *Spencer John Herapath* has not been called to give me any information on the subject. The Plaintiffs excuse themselves for not calling him by saying, that, if they could have called him, the Defendants could also have done so, and they have not. It appears, from the correspondence between the parties, that the Plaintiffs' solicitor was also solicitor for *Spencer John Herapath*, and that he declined to allow any communication to take place between his client, *Herapath*, and the Defendants' solicitors, excepting in his own presence, and it is suggested that for this reason the Defendants did not call *Herepath*. I do not think I can take that into consideration. It explains why they should not have been willing to call him; but I do not think it is a sufficient reason why they should not call him if they otherwise could have done so. But on whom is the burden of proof? If

there is information which might have been, but is not forthcoming, and which might have been very material, who ought to have produced it? I think the burden of producing it lies on the person who has to make out his case, and, in my opinion, that person in this instance is the Plaintiff. And I say so for this reason: it is clear that the Defendants have got the legal interest in the shares, because they have all been transferred into the names of their trustees, and they hold them. The Defendants have the legal title—they have the right to deal with the shares as they please, and in fact, as I understand, they have dealt with some of them since the action commenced, no doubt by arrangement with the other parties; but I mean they have been able to deal with them without the signature of Mr. *Bentinck* or his executors. They have the legal ownership of the shares. They have what in the case of land would be described as the legal estate, and it seems to me that they have a right to keep that benefit, unless it can be shewn that there are equitable grounds upon which they should be deprived of it. It seems to me, therefore, that in order to displace their *primâ facie* title—a title which they could clearly confer on any one to whom they might sell the shares for value, and without notice—it is incumbent on the persons who say it must be taken away to make out a good case for so doing. Therefore, it seems to me that the obligation of giving the material evidence as to the position of *Bentinck* with regard to the stockbrokers' firms lay upon the Plaintiffs, and that obligation they have not performed by reason of their not calling a person who must be able to give material information on the subject. I do not see how I can infer, as I have been asked to do, that what was done by the brokers was done without the authority of *Bentinck*. In whatever position I might have been, if better evidence could not have been produced, I decline to draw inferences as to matters upon which evidence might have been brought before me by the Plaintiffs. I think that is an answer to the Plaintiffs' case; they have not proved sufficient to displace the legal title of the Defendants to these shares.

But it is said that they have done so, and, no doubt, if an equitable infirmity in the Defendants' legal title is shewn by the evidence, that title is not one which cannot be displaced

NORTH, J.
1893
BENTINCK
v.
LONDON
JOINT STOCK
BANK.

by the Court. The question, therefore, is whether, in acquiring the legal title, there was any want of honesty on the part of the bank, or whether there is any infirmity in the title which they have obtained. Now, as regards the honesty of the bank, nothing whatever has been suggested against it with respect to any of the securities. But it is said that, as regards the securities transferred to them, there was sufficient to put the bank upon inquiry, and that the prosecution of that inquiry would have led to their finding out that *Bentinck* had an interest in the matter, and the question is, whether it is made out that there was anything to put them upon inquiry. The evidence is clear that they had no notice—I mean no express notice, no information, no knowledge, and no suspicion that *Bentinck* was interested in these shares. But it is said that there was enough to shew them that some other person than the brokers was interested in them, and that, therefore, it was incumbent upon the bank to make inquiries to ascertain who that other person was, and what his interest was, and that, if they did not think fit to do so, they took the risk upon themselves, and if it turns out that these securities did belong to someone else, the bank's title cannot be maintained against him. It has been pressed upon me by the Solicitor-General that the infirmity of the bank's title is this, that, when they took these shares, they were told that the securities which the brokers were depositing, and upon which they were receiving large advances, either belonged to the brokers, or that they had authority to deal with them. I do not find any evidence that any such a statement was ever made. The only written statements bearing upon the point are three requests made by the brokers to the bank for an advance of money, "Upon the deposit of the securities you hold of ours." The statement, therefore, is that the security is "ours," that is, the brokers'. It is said that "ours" means "deposited by us," and not "belonging to us, as distinguished from other persons." It might possibly have that meaning, and I do not wish to give too much weight to it; but still, when we find written statements made, they do suggest that the securities which were deposited when the memorandum was given are "ours." The theory that such a statement as is alleged

was made is built upon what was said by two or three officers of the bank in their examination in *Earl of Sheffield's Case* (1), in *Simmons' Case* (2), and in the present case. I have looked carefully at the evidence in all those cases, and I cannot find that any statement was ever made to the bank by the brokers, or by any person on their behalf, that the securities deposited were either their own, or that they had authority to deal with them. When these officers of the bank were being examined, they disclaimed all idea of the securities not belonging to the brokers, and the theory is built up upon this, that, when they were pressed as to what they thought about the matter, they said they thought they were securities with which the brokers had authority to deal, and they asked no questions. Why should they, if they thought that everything was right? I cannot see why. If statements had been made to them in the pointed alternative form suggested, "These securities are either ours, or they belong to other persons for whom we are agents," the matter would have stood in a different position; but I cannot find that any such statement was ever made, and I do not see why the fact that the officers of the bank formed an opinion that they were securities with which the brokers had authority to deal in any way displaced the right of the bank, or put the bank upon inquiry.

In the present case a new point has been raised, a point which was not raised in the previous cases, viz., that the bank had very good grounds for believing that the brokers had authority to deal with these shares, even if they were not strictly their own, by reason of the great prevalence of what are called "contango" or "continuation" transactions upon the *Stock Exchange.* It was said by the Plaintiffs' counsel that this matter was never mentioned in the earlier cases, and that this bringing in of "contango" transactions is an after-thought, and that I ought not to pay much attention to it. No doubt, if new matters are brought forward in evidence at a late stage, after other cases have been decided in which the same point might have been, but was not, raised, one is very properly apt to look with some suspicion upon that evidence. But if, on

(1) 13 App. Cas. 333. (2) [1891] 1 Ch. 270; [1892] A.C. 201.

NORTH, J.
1893
BENTINCK v. LONDON JOINT STOCK BANK.

looking into it, that suspicion is allayed, and a satisfactory reason is given for not bringing forward the evidence before, its force is not in any way weakened by the fact that it was not brought forward before.

Now the evidence as to "contango" transactions is this—I am only giving a short *résumé* so far as it is now material—when a client directs a broker to buy stock for which the client is not himself finding the money to pay at the time, the money is provided by the broker, and he borrows the money for the purpose. This is done sometimes, no doubt, by a pure and simple loan; but in a very large majority of cases, amounting, according to the evidence of Mr. *Grant*, the official assignee of the *Stock Exchange*, to sixteen-twentieths of the whole business on the *Stock Exchange*, and, according to Mr. *Powell's* evidence, to nineteen-twentieths of the whole business, the thing is done by the broker finding the money on "contango," and then what happens is this: he is treated, not as the mortgagee or pledgee of the shares for the money which he advances, but he becomes by contract the purchaser of the shares out and out, and they become his own property. The shares are not yet transferred to him—he does not acquire any legal interest in them; but, as between the client on whose account he has bought them on the one hand, and himself on the other, when he finds the money on "contango" he becomes the absolute owner of the property, subject, however, to a contract made at the same time, or part of the same contract, that he is to re-sell to the client a like amount, not the same identical shares, but a like amount of similar shares, usually on the next account day, although a later day may be fixed by arrangement, at a price larger than that for which he gave his client credit on the first occasion; because the enhanced price is to cover interest upon the money in the meantime. Therefore, in fact, these "contango" transactions, although they are constantly treated as loans of money, even by persons who are thoroughly familiar with the business, although they are popularly spoken of, even on the *Stock Exchange* and by members of the *Stock Exchange*, when they come before the Court, as loans, yet, when the transaction is regarded from a legal point of view, it is not a loan on the client's security, but is a sale by which

the broker becomes entitled to the security as his own, although he is subject to a contract to re-sell to the client, not the same, but an equal amount of similar shares or stock at a future date. In all these transactions, therefore, when money is borrowed from a stockbroker on "contango" or "continuation," whether the money is obtained from the dealer or from other stockbrokers, or from bankers, the result is the same: the arrangement is one by which the broker becomes, as between himself and his client, the owner of the shares in question, although he is under a contract to provide an equal amount of similar shares at a future date. This being the nature of the business between the parties, the reason why these "contangos" or "continuations" are often called loans is quite clear; but this does not alter the legal position of the parties concerned in them, or prevent the shares held by the brokers under such circumstances from being their own and available by them. And, when we find what a large amount of business is done in that way, there is ample ground upon which the officers of the bank might come to the conclusion that shares or stocks which were held by the brokers were within their absolute power, even if they were not their own, and, therefore, any doubt or suspicion which might otherwise have arisen in the mind of an officer of the bank would be at once quelled and allayed by his knowledge of the course of business. Therefore, I cannot say that it was brought to the attention of the bank or their officers that any one but the brokers had an interest in any one of these securities.

The evidence of independent witnesses establishes that this state of things which I have endeavoured to explain has been existing, and has been matter of ordinary knowledge and of ordinary business on the *Stock Exchange*, for many years past, and I cannot say that the bank were not entitled to have regard to it.

It is suggested, however, that some inquiry should have been made by the bank, even as to the shares which were transferred by *Bentinck* himself to their trustees. As to that, I see great difficulty, because, even if there were any obligation to inquire as to those shares which were transferred by third parties, it seems to me that the production of a document admittedly executed by Mr. *Bentinck*, transferring to the trustees of the bank particular

NORTH, J.
1893
BENTINCK
v.
LONDON
JOINT STOCK
BANK.

shares, authorized the bank in concluding that these shares were intended to be dealt with in the only way in which such shares are dealt with by them, viz., as security for money to be advanced by them.

Then, as regards the other securities which were not transferred by *Bentinck* himself, why should any inquiry have been made by the bank? I confess I cannot understand, unless upon the theory put forward by the Solicitor-General, that certain statements had been made by the brokers which I find, as a matter of fact, had not been made. On this point I think it is material to refer to some observations made by Lord *Herschell* and Lord *Macnaghten* in *Simmons' Case* (1). The securities then in question were negotiable securities, corresponding with some of the securities in the present case; but those of which I am now speaking were not negotiable. I do not forget that; but nevertheless, in my opinion, the observations which I am about to read apply, because they refer to the course of dealing between the bank and this same firm of brokers in transactions similar to those with which we are now dealing. There are facts which are common to both cases, although the clients behind the scenes were different. Lord *Herschell* said (2): "I desire to rest my judgment upon the broad and simple ground that I find, as a matter of fact, that the bank took the bonds in good faith and for value. It is easy enough to make an elaborate presentation after the event of the speculations with which the bank managers might have occupied themselves in reference to the capacity in which the broker who offered the bonds as security for an advance held them. I think, however, they were not bound to occupy their minds with any such speculations. I apprehend that when a person whose honesty there is no reason to doubt"—that is, the firm of *Herapath, Delmar & Co.*—"offers negotiable securities to a banker" (the *London Joint Stock Bank*) "or any other person, the only consideration likely to engage his attention is, whether the security is sufficient to justify the advance required. And I do not think the law lays upon him the obligation of making any inquiry into the title of the person whom he finds in possession of them; of course, if there is anything to arouse suspicion, to lead to a doubt whether

(1) [1892] A. C. 201. (2) [1892] A. C. 223.

the person purporting to transfer them is justified in entering into the contemplated transaction, the case would be different; the existence of such suspicion or doubt would be inconsistent with good faith. And if no inquiry were made, or if on inquiry the doubt were not removed and the suspicion dissipated, I should have no hesitation in holding that good faith was wanting in a person thus acting." And Lord *Macnaghten* said (1): "Did the bank take the *Cedulas*"—those were the securities—"in good faith? They took them with other securities from a firm of stockbrokers who were at the time of unblemished reputation. They took them in the ordinary way of business to cover their current advances. In regard to this question, the difficulty is to see what there was in the transaction to suggest a shadow of suspicion that there was anything wrong with the deposit. The only objection alleged is that securities of different customers of the stockbrokers were pledged for one entire advance, and it is said that the bank ought to have known it. But even so, if the bank had no reason to suppose that the stockbrokers were not at liberty to pledge each and all of the securities for their full value, I cannot see in what the supposed want of good faith consists. As was pointed out in *Foster* v. *Pearson* (2), such a practice—and the practice prevails in the case of stockbrokers as much as in the case of bill-brokers—has advantages for the customers as a body, though it may occasionally operate hardly on an individual." These remarks of those two learned Lords were made upon evidence which has been read now and relied upon as proving the present Plaintiffs' case. It has been said that it will not do to take what the officers of the bank say now, but that we must look at what they said in the earlier cases. That evidence, however, was actually before the House of Lords, and formed the basis of the opinions expressed in the judgments from which I have just quoted. Under these circumstances, I cannot see any reason for suspicion on the part of the bank that the brokers were doing that which it was not within their power to do.

There was another point taken, which, as a good deal was said about it, I ought not to pass over altogether. It was said that in

(1) [1892] A. C. 225. (2) 1 C. M. & R. 849.

NORTH, J.
1893
BENTINCK v. LONDON JOINT STOCK BANK.

the present case the bank had the benefit of an estoppel against Mr. *Bentinck*. If a fraud has been committed, it is said, who ought to suffer? The person who did the acts, the doing of which enabled the brokers to cheat the bank, or the bank, who were misled through no fault of their own? Several cases were cited which go to shew that there was such an estoppel by conduct on the part of Mr. *Bentinck* as prevents him from making any claim in respect at any rate of those shares the transfers of which to the bank's trustees were actually executed by himself. In *Goodwin* v. *Robarts* (1), some scrip was not signed, but was merely left in the hands of brokers, and that was held to be a sufficient estoppel by conduct to the person who had left it, so as to postpone him to another person who had not been guilty of any default or omission to make proper inquiries. Then, again, in *Colonial Bank* v. *Cady* (2), some observations were made by two of the learned Lords which are very much in point here. In that case blank forms of transfer were indorsed on certificates of shares, which forms, if duly signed, would have had the effect of transferring, not the shares themselves, for they could pass only by registration in the books of the company, but the right to be registered in the books of the company. Those forms were not quite in order, because they were signed by executors, but not in a way which would amount to a sufficient authority to transfer. The facts, therefore, of that case, do not bear upon the present case. But Lord *Watson* said (3): "Whether the respondents are estopped from saying that *Blakeway* had not their authority to dispose of the certificates in question is, in my opinion, the sole question presented for decision in these appeals. Had the transfers been executed by *John Michael Williams*, and the certificates thereafter sent by him to *Thomas, Sons & Co.*" (they were the brokers) "for safe custody, I should not have hesitated to hold that *Blakeway*, though acting fraudulently, was nevertheless placed by his act in a position to give a title to an honest purchaser which his employer could not dispute." Again Lord *Herschell* said (4): "If in the present case the transfer had been signed by the registered owner and delivered by him to the

(1) 1 App. Cas. 476.
(2) 15 App. Cas. 267.
(3) 15 App. Cas. 278.
(4) Ibid. 285.

brokers, I should have come to the conclusion that the banks had obtained a good title as against him, and that he was estopped by his act from asserting any right to them." If that would have been so, when share certificates had merely been deposited with brokers for safe custody, the present seems to me to be an *à fortiori* case, the transfer having been actually made into the names of the trustees of the bank. For what purpose? There can be no conceivable purpose but that of enabling money to be obtained from the bank upon the security of the shares so transferred.

Under these circumstances, I come to the conclusion that the bank are entitled to hold these stocks, shares, and bonds as a security for what is due upon the balance of account between themselves and the brokers who deposited them. Of course, that does not displace the Plaintiffs' right to an account, if they ask for it; but it is admitted that what is due to the bank upon that footing is much more than the value of the securities. No relief, therefore, is asked by the Plaintiffs upon that footing. Upon the ground on which alone they ask relief, in my opinion, they are not entitled to it, and, therefore the action must be dismissed, with the usual consequences.

Solicitors: *R. S. Gregson*; *Clarke, Rawlins & Co.*

W. L. C.

NORTH, J.
1893
Feb. 10.

ROBSON *v.* EDWARDS.

[1893 R. 78.]

Easement—Light—Prescription—Lease—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 3.

Two tenements were held under leases from the same landlord. The lessee of the first enjoyed access of light to his windows over the second tenement for more than twenty years prior to the expiration of his lease. He continued to hold under an agreement for a lease for a term still running. The lease of the second tenement was subsequently surrendered; the landlord granted a lease to a new tenant:—

Held, that the tenant of the first tenement had a right to access of light over the second tenement.

THIS was a motion for an interlocutory injunction restraining the Defendant from erecting the back wall of a theatre he was building so as to obstruct the access of light to windows of three houses 31, 32, and 33, *Lisle Street*, of which the Plaintiff was lessee. A question arose on the motion whether the Plaintiff had a prescriptive right to the access of light to two of his houses, 32 and 33, *Lisle Street*, over premises No. 18, *Ryder Court, Cranbourne Street*, which formed part of the site of the Defendant's theatre. Lord *Salisbury* was the landlord of both the Plaintiff's and the Defendant's premises. In December, 1882, the Plaintiff occupied Nos. 32 and 33, *Lisle Street*, under a lease for twenty-one years, expiring on the 25th of December, 1882. He and his predecessors in title had enjoyed access of light to the premises through the same windows on the south side of his houses over No. 18, *Ryder Court* for a period of more than twenty years. On the 22nd of December, 1882, the Marquis of *Salisbury* agreed to grant him a fresh lease of those two houses for a term of twelve years from the 25th of December, 1882, and he continued after the expiration of his lease to occupy and pay rent under the agreement. In December, 1882, No. 18, *Ryder Court* was held by one *William Thompson* of the Marquis of *Salisbury*, under a lease for twenty-one years, which would have expired on the 24th of June, 1888. That lease was surrendered to the Marquis of *Salisbury* in 1887, and he granted a fresh lease of

18, *Ryder Court* for ten years from the 24th of June, 1887, to one *August Neuendorff*. The Defendant was assignee from *Neuendorff*. The premises No. 18, *Ryder Court* were also subject to an agreement for the building of a theatre on a site including the site of that house. This building agreement, to which the Marquis of *Salisbury* was party, was vested in the Defendant.

Cozens-Hardy, Q.C., and *Bethell*, for the Plaintiff:—

To go back only to the end of 1861 or beginning of 1862—from that period to December, 1882, the Plaintiff and his predecessors enjoyed the uninterrupted access of light to old windows over 18, *Ryder Court* for more than twenty years. By operation of sect. 3 of the *Prescription Act*, 1832, therefore, an absolute and indefeasible easement had accrued appurtenant to the Plaintiff's premises. It made no matter under the section that the interest of the person enjoying the access of light was leasehold: *Frewen* v. *Philipps* (1); *Mitchell* v. *Cantrill* (2).

S. Hall, Q.C., and *Cave*, for the Defendant:—

This differs from the case of *Mitchell* v. *Cantrill*, which decided that the holder of a long lease can prescribe against the holder of another long lease from the same landlord. Here the leases were comparatively short. A tenant cannot prescribe against his own landlord: *Gayford* v. *Moffatt* (3).

[NORTH, J.:—That was not a case of light; it was under a different section of the *Prescription Act*.]

The principle there laid down by Lord *Cairns*, that it would be inequitable for a lessee to be allowed to prescribe against his landlord is applicable to a right to access of light as much as to a right of way or any other easement.

The right of the landlord intervened at the expiration of the Plaintiff's lease in 1882; the easement, if any, then merged: *Coutts* v. *Gorham* (4). By virtue of the then existing lease of 18, *Ryder Court*, those premises were freed from the servitude (if any servitude existed) on the principle that a landlord could not derogate from his own grant previously made.

(1) 11 C. B. (N.S.) 449.
(2) 37 Ch. D. 56.
(3) Law Rep. 4 Ch. 133.
(4) 1 Mood. & M. 396.

NORTH, J.
1893
ROBSON
v.
EDWARDS.

Alternatively, we contend that when the new lease was granted by Lord *Salisbury* in 1887, the right, if any, of the Plaintiff had come to an end: *Booth* v. *Alcock* (1). The Defendant's lease is legal; the Plaintiff's interest then lay in agreement. The new lessee, and those claiming under him, are not affected with notice of any equitable right the Plaintiff may have had: *Allen* v. *Seckham* (2); their legal right must therefore prevail.

Cozens-Hardy, in reply, on the facts relating to the alleged obstruction.

NORTH, J.:—

As regards the legal aspect of the case, I think the matter is entirely free from doubt.

The Plaintiff's father became lessee of what I will call the Plaintiff's houses, Nos. 32 and 33, in the year 1862, for a term of twenty-one years expiring at Christmas, 1882. In the year 1880 the Plaintiff succeeded his father, and entered into possession of the property, and the lease was assigned to him, and he became tenant of the property. At the end of that time he did not go out, because, a few days before, an arrangement had been made by written agreement, under which he was to have a renewal of the lease for a term which will expire at Christmas, 1894—that is to say, nearly two years of that have yet to run. The parties have allowed it to rest in agreement. No actual lease has been prepared, but the rent has been paid upon the footing of the agreement, and the mere fact that a formal parchment-deed has not taken the place of the agreement for a lease is, in my opinion, immaterial.

The Defendant is the owner of opposite property, with certain intervening property belonging to other persons, coming between the two; and 18, *Ryder Court*, which is the site of part of the theatre which the Defendant is erecting, was made the subject of a lease by the landlord of the property to one *Neuendorff* in the year 1887, and in 1891 that lease was assigned to the Defendant. These leases that I have mentioned (it is clearly proved as to the Defendant's lease) have been leases succeeding previous leases

(1) Law Rep. 8 Ch. 663. (2) 11 Ch. D. 790.

by the landowner, and no doubt the Plaintiff's father's lease had been so too, because the houses are old houses. The houses comprised in both leases are old houses, built a good many years ago—far more than twenty years since. The sites of both belong to Lord *Salisbury*, and are part of the *Salisbury* estate in *London*.

The question is, What are the legal rights of these parties? Assuming there was no legal right, either actual or inchoate, in 1862—because that is the point at which I must begin, as I cannot fix any definite time earlier at which these houses were existing—assuming that there was no right to light in 1862, at any rate when the Plaintiff's father went into occupation the time for the acquisition of a right by statute to have the light coming to 32 and 33 and 34 at the back over the adjoining lands began to run, and at the end of twenty years from that time that right became absolute and indefeasible under the 3rd section of the *Prescription Act*. The fact that the premises have not been in the occupation of the same person all along is clearly immaterial. It does not matter what the number of tenants may have been, because the Act says: "When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, ... unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." There is no evidence whatever in this case of anything which brings it within the exception. There is no evidence that it was enjoyed by any consent or by any agreement, either expressly or otherwise, made relating to it by deed or writing. Therefore, the right at the end of twenty years became absolute and indefeasible.

The lease granted on the 8th of December, 1862, expired on the 25th of December, 1882. At that time, therefore, when that lease expired, the twenty years had run, and the right had become absolute and indefeasible appurtenant to that house, as it was then occupied by the Plaintiff. What difference does it make that, that lease coming to an end, the ground landlord renewed the lea se, or agreed to renew the lease, to the same tenant? In

NORTH, J.
1893
RONSON
v.
EDWARDS.

my opinion, it does not make any difference. The contention is that it put an end to the right to light acquired by the twenty years which had expired before Christmas, 1882, and it is said that because that lease ended and a new one was granted no time had run, and you must begin to count the twenty years afresh. In my opinion, that is not the law. When twenty years had run, the right was acquired absolute and indefeasible in respect of the access of light to that house; and when the house was leased afterwards, the right given by law passed with it, not by reason of the lease, though, no doubt, the person who became tenant went in under the lease; but he did not get the grant to the light by the lease in any sense. He got the house by the lease, and the law gave the tenant, the occupier of the house, the right to the enjoyment of that light at that time.

Then it is said that by reason of the lease of 1887 to the Defendant or to the Defendant's predecessor something was done which interfered with that. I cannot follow that in the least, because I cannot see how the making of the lease in 1887 could have any effect upon a prior demise by the same landlord as far back as the year 1882; for, as I have said, the agreement to lease, coupled with the possession and the payment of rent under it, come to exactly the same thing as if a formal parchment lease had actually been signed.

The Plaintiff therefore is, in my opinion, clearly right on the question of law.

[His Lordship considered the evidence as to obstruction and granted an injunction to meet the circumstances.]

Solicitor for Plaintiff: *G. M. Jameson.*

Solicitors for Defendant: *Slark & Metcalfe.*

D. P.

CHESTON *v.* WELLS.

NORTH, J.

1893
Feb. 18.

[1892 C. 4728].

Practice—Mortgage—Foreclosure—Form of Judgment—Money in hands of Receiver.

Upon motion for judgment in a foreclosure action, the Court refused to insert in the judgment a direction similar to that which was inserted in the judgment in *Coleman* v. *Llewellin* (1), there being no special circumstances in the case.

MOTION for judgment in default of appearance of the Defendant.

The action was for the foreclosure of a mortgage.

The writ was issued on the 22nd of December, 1892.

By a deed dated the 4th of May, 1889, the Defendant mortgaged some land and houses at *Felixstowe* to the Plaintiff, to secure £550 already advanced to the Defendant, with interest thereon, and further advances, not exceeding in the whole £600, with interest thereon. The deed contained the ordinary covenant by the mortgagor for payment of the principal and interest, the day fixed for payment being the 20th of November, 1889. On the 4th of May, 1889, the Plaintiff advanced the further sum of £50 to the Defendant on the security of the mortgage. On the 26th of July, 1889, the Defendant executed in favour of the Plaintiff a further charge on the property for £50 and interest, and entered into the ordinary covenant for payment; the day fixed for payment being the 4th of May, 1890. The statement of claim alleged that the whole of the £600 and of the £50, with interest thereon respectively from the 4th of November, 1891, was still due to the Plaintiff, less £4 which had been paid on the 25th of June, 1892, in respect of the interest due on the 4th of May, 1892.

The Plaintiff claimed an account of what was due to him for principal, interest, and costs under or by virtue of his securities, and to have the mortgage and further charge enforced by foreclosure or sale; a personal judgment against the Defendant for

(1) 34 Ch. D. 143.

NORTH, J.
1893
CRESTON
v.
WELLS.

payment of the two sums of £600 and £50, together with interest thereon from the 4th of November, 1891, to judgment, less the £4 paid, and the costs of the action so far as occasioned by the claim for payment; and to have a receiver appointed.

The Defendant did not appear to the writ, and the statement of claim was filed on the 1st of February, 1893.

On the 27th of December, 1892, the Court, on the application of the Plaintiff, appointed a receiver of the rents and profits of the mortgaged premises.

On the 14th of February, 1893, the Plaintiff gave notice of motion to be made on the 18th of February, for such judgment as the Court should consider the Plaintiff entitled to upon the statement of claim.

In the proposed minutes of judgment the following direction was inserted:—

"Let any persons redeeming the premises under the provisions of this order, or the Plaintiff in the event of foreclosure, be at liberty to apply to the Judge in Chambers for payment and transfer of any money or the annuities in Court to the credit of the action, or in the hands of the receiver."

G. Henderson, for the Plaintiff:—

The direction which it is proposed to insert in the judgment is similar to that which was inserted in the judgment in *Coleman* v. *Llewellin* (1).

NORTH, J.:—

It is evident from what was said by the Judges of the Court of Appeal in *Coleman* v. *Llewellin* that there must have been some special circumstances in that case. I cannot see any special circumstances in the present case, and I am not disposed to adopt a course which will enable the Plaintiff to postpone the passing of the receiver's accounts till after the foreclosure, and then to put into his pocket money in the receiver's hands at the date of the certificate which ought to have been brought into the account with the mortgagor.

(1) 34 Ch. D. 143.

As a personal judgment against the mortgagor is asked for the amount alleged in the statement of claim to be due, an affidavit must be produced to the Registrar that since the filing of the statement of claim nothing has been received by the Plaintiff in respect of principal or interest.

Solicitors: *Jones, Hall & Manning.*

W. L. C.

STIRLING, J.

1893

Jan. 31; *Feb.* 3, 4, 9, 10.

BARCLAY *v.* PEARSON.

[1892 B. 5898.]

Gaming—Lottery—Wager—"Missing-word" Competition—Illegal Contract—Right of Competitors to return of their Contributions—Lottery Act, 1802 (42 *Geo.* 3, *c.* 119), *s.* 1.

The Defendant, who was the proprietor of a newspaper, carried on in connection therewith a competition under the following conditions. He published in his paper a paragraph omitting the last word. In the same paper he printed a coupon with a direction that persons wishing to enter the competition must cut out the coupon, fill in the word missing from the paragraph, together with their names and addresses, and send it, with a postal order for 1*s.*, to the office of the paper. It was further stated in the paper that the missing word was in the hands of a chartered accountant, enclosed in a sealed envelope; that his statement with regard to it would appear, with the result of the competition, in a subsequent issue of the paper; and that the whole of the money received in entrance fees would be divided equally amongst those competitors who filled in the missing word correctly. In an action by the successful competitors against the Defendant and the unsuccessful competitors, seeking administration of the trusts of the moneys in the hands of the Defendant for the purposes of the competition, and distribution among the persons entitled thereto:—

Held, (1.) that the competition constituted a lottery within the meaning of 42 Geo. 3, c. 119, and was illegal; (2.) that so far as the money in the hands of the Defendant was impressed with any trust, it was one which had arisen out of an illegal transaction, and the Court would not render any assistance in its administration; and, *semble* (3.) that notwithstanding the illegality of the competition the competitors had a legal right, enforceable by action at law, to the return of their contributions, at all events, provided that they gave notice of their claim before the money had been distributed by the Defendant.

SPECIAL CASE.

This action was brought by *Edward Ernest Barclay,* and continued by *Theodore Oppler,* on behalf of themselves and all other the prize-winners in and contributors to "The Missing-word Competition No. 53," in the journal known as *Pearson's Weekly,* against *Cyril Arthur Pearson,* the editor, and *C. A. Pearson, Limited,* the proprietor of *Pearson's Weekly,* and *Michael Hearn,* an unsuccessful competitor in the competition, seeking administration of the trusts of the moneys in the hands of the Defendant

Pearson for the purposes of the competition; distribution of the moneys among the persons entitled thereto; and ancillary relief.

The action arose out of one of a series of competitions carried on by the Defendant *Pearson* in connection with his paper. The nature of these competitions is described in the special case set out below; but, shortly stated, it was as follows. The Defendant *Pearson*, by means of an advertisement in his paper, invited the public to contribute, in sums of 1*s.* each, to a fund, which he undertook to divide equally amongst such of the contributors as should correctly guess a word which was omitted from a given paragraph or sentence printed in his paper. In the particular competition which formed the subject of this action, the subscriptions of the competitors amounted to £23,628 14*s.*, and the result, as published in the Defendant's paper, was that 1358 persons were declared to be winners of £17 8*s.* each. Before the money so subscribed had been distributed, a competition of a similar nature was declared by a metropolitan police magistrate (Sir *John Bridge*) to be illegal, as an infringement of the *Lottery Acts*, and in consequence of this decision the Defendant *Pearson* did not pay over the money to the winners. The Plaintiff then brought this action, and moved for the appointment of a receiver of the fund, or for an order upon the Defendant to pay it into Court. An order was made upon the motion, in pursuance of which the Defendant paid the fund into Court.

A special case was then stated for the opinion of the Court upon the following questions: (1.) Whether the competition was illegal under any of the statutes against lotteries, wagers, or otherwise; (2.) If the competition was illegal, then, whether or not the competitors in the competition were entitled (subject to such provision as to costs as the Court might think just) to have the sum of £23,628 14*s.* (now in Court) returned to them, and how such return was to be made. It appeared from the case that for upwards of a year prior to the issue of *Pearson's Weekly* for the week ending the 10th of December, 1892, competitions known as "missing-word competitions" had from time to time been announced in that journal. These were all of the same nature and regulated by the same conditions as that competition

STIRLING, J. 1893 BARCLAY v. PEARSON.

to which the writ in the action referred, viz., "Missing-word Competition No. 53." The terms of that competition were thus stated in the case:—

"In the issue of *Pearson's Weekly* for the week ending the 10th of December, 1892, there appeared the following announcement:—'The correct word in this competition will be found in the number of *Society News*, which is on sale at all newsagents first thing on the morning of Thursday, December 15. Full particulars will appear, as usual, in *Pearson's Weekly* of the following Saturday.

"'Missing-word Competition, No. 53.

"'On the 3rd column of page 331 is a paragraph about an experiment with camphor. The last word in it is omitted. Readers who wish to enter this competition must cut out the coupon below, fill in this word, together with their names and addresses, and send it with a postal order for 1*s*., to reach us at latest by first post on Monday, December 12, the envelope marked "Word."

"'The correct word is in the hands of Mr. *H. S. Linley*, chartered accountant, 124, *Chancery-lane, London, W.C.*, enclosed in an envelope sealed with our seal. His statement with regard to it will appear with the result of the competition in the issue for the week after next. The whole of the money received in entrance fees will be divided amongst those competitors who fill in the word correctly. It is hoped that competitions will be posted to *Temple Chambers, London, E.C.*, as early in the week as possible. Members of the same family may compete if they like, and any one may send as many attempts as he or she chooses, provided that each is accompanied by a separate coupon and a sufficient remittance. All postal orders must be made payable to *Pearson's Weekly*. Coupons also appear in *Society News* and the *Companion*, which entitle purchasers to enter for *Pearson's Weekly* missing-word competition on payment of the usual 1*s*.'"

On the 3rd column of page 331 of the last-mentioned issue of *Pearson's Weekly* there was the following paragraph about an experiment with camphor:—"Here is a little experiment which

is well worth shewing to your friends. Procure a bit of ordinary camphor and from it break off tiny pieces. Drop these upon the surface of some pure water contained in any kind of vessel and they will immediately begin to rotate and move about, sometimes continuing to do this for several hours. The water must be quite clean, for if a drop of oil or any grease is in it the experiment will not work. But, provided that nothing of this sort gets in, the little pieces of camphor will twirl about in a manner that is extremely ——." Coupons to the number of 472,574, with sums of money amounting in all to £23,628 14s., were sent to the Defendant *Pearson*. The "correct word" proved to be "unaccountable," and was given by 1358 competitors, among whom were the Plaintiffs *Barclay* and *Oppler*, one of whom was stated to have sent eighty-eight coupons. The Defendants *Cyril A. Pearson* and *C. A. Pearson, Limited*, claimed no beneficial interest in the fund. It was stated that they wished to apply the same in accordance with the terms of the competition, and would have done so had they not been prevented from so doing, and they submitted to deal with the fund in whatever manner the Court might think proper. The Defendant *Hearn* sent in one coupon not containing the word "unaccountable." He repudiated the competition, and demanded the return of the shilling contributed by him to the fund.

By an order dated the 12th of January, 1893, he was appointed to represent all the unsuccessful competitors in the competition.

The special case now came on for hearing.

Buckley, Q.C., and *Stokes*, for the Plaintiffs:—

The question is whether this competition is illegal on the ground of its being either a lottery or wager. We say that it is neither one nor the other. It is certainly not a lottery; and if it be a wager, it is not necessarily illegal, and we submit that the Defendant has made himself a trustee of the fund for the contributors, and, there being no illegal consideration, the trust ought to be administered.

First, then, is it a lottery? There cannot be a lottery unless there is a pure chance. If the element of selection is present, then there is no lottery.

STIRLING, J.
1893
BARCLAY v. PEARSON.

The statutes relating to lotteries are all collected in *Chitty's* Statutes (1).

They are also discussed in *Stutfield* on Betting (2).

The first Act is the 10 & 11 Will. 3, c. 17, by which all lotteries were declared to be common and public nuisances, and all grants, patents, and licenses for lotteries to be void and against law; and the keeping of or drawing, playing, or throwing at any lottery, either by dice, lots, cards, balls, or any other numbers or figures, or any other way whatsoever, was prohibited, under penalties of £500 for keeping and £20 for playing at a lottery. That Act was followed by the 9 Anne, c. 6, which was passed for the purpose of raising £1,500,000 by way of a lottery, for the service of the year 1711; and for suppressing unlawful lotteries. A later Act was the 12 Geo. 2, c. 28, which was passed for the more effectual preventing of excessive and deceitful gaming. It prohibited the keeping of a lottery under penalty of £200, and declared certain games, such as ace of hearts, pharaoh, basset, and hazard, to be games or lotteries by cards or dice, and prohibited the playing of them under a penalty of £50.

The general scheme of the Acts is to render illegal the division of property by chance or lot by means of cards or dice.

Other Acts were passed from time to time in order to prohibit various games which were invented to take the place of those previously declared to be illegal. The Act 13 Geo. 2, c. 19, prohibited the games of passage and other games with dice, except backgammon; the 18 Geo. 2, c. 34, declared "roly-poly" and other games with cards or dice to be illegal; the 42 Geo. 3, c. 119, was passed to suppress all games or lotteries called "little goes."

It was under that Act and the Act 4 Geo. 4, c. 60, that the prosecution was instituted in the case before Sir *John Bridge*. The essence of that case, however, was that the word to be supplied was not a definite word, selected before the competition, but it was a word selected, after the entries were closed, by drawing it out from a number of other words written on pieces of paper and placed in a bag, which rendered the selection a mere chance.

(1) Vol. ii. p. 1310, *et seq.*, sub-tit. "Gaming." (2) 2nd Ed. p. 117, *et seq.*

[STIRLING, J.:—Is there not also in this case the element of chance? That must be so unless the winning word is necessarily the word which is most appropriate to the sentence.]

In order to constitute a lottery there must be a pure chance, which is not the case here. A lottery is the staking of money upon an uncertain event, which is to be rendered certain by a chance or lot. It may be that the casting of dice or the drawing of lots is not essential to the constitution of a lottery; but there must be a pure blind chance. If the element of selection is present, then it is not a lottery: *Morris* v. *Blackman* (1); *Taylor* v. *Smetten* (2); *Caminada* v. *Hulton* (3).

If any power of reason or will is exercised upon the question of selection, then the element of chance is gone, and there is no lottery.

In *Johnson's* Dictionary, a lottery is defined as "a game of chance; a sortilege; distribution of prizes by chance; a play in which lots are drawn for prizes." In *Webster's* Dictionary (1832) it is said to be "a scheme for the distribution of prizes by chance, or the distribution itself"; and in various other dictionaries the word is defined as something to be determined by lot or chance as distinguished from selection: *Ogilvie, Worcester,* and *Skeat.* In *Taylor* v. *Smetten,* Mr. Justice *Hawkins* adopted the definition given in *Johnson* and *Webster.*

[STIRLING J.:—In this case the word is determined by the arbitrary selection of the editor of the paper.]

If it were chosen after the competition that might make a difference; but here it is fixed upon by the editor previous to the competition, and there is no chance, and therefore no lottery. Skill and thought were required by the competitors in selecting the word.

We also submit that the competition is not a wager. At common law wager contracts were neither illegal nor void; but there were certain kinds of wagers which could not be enforced, as being of a mischievous, immoral tendency, or contrary to the policy of the law. Instances of the kind of cases

(1) 2 H. & C. 912. (2) 11 Q. B. D. 207.
(3) 60 L. J. (M.C.) 116.

STIRLING, J.

1893

BARCLAY v. PEARSON.

which have come before the Courts upon this subject are afforded by *Hussey* v. *Crickitt* (1) and *Eltham* v. *Kingsman* (2). But certain classes of wagers have been from time to time declared by statute to be illegal: 16 Car. 2, c. 7; 9 Anne, c. 14; 5 & 6 Will. 4, c. 41; 8 & 9 Vict. c. 109, s. 18. But it is clear that by the last-named Act wager contracts are avoided only, and not rendered illegal. *Thacker* v. *Hardy* (3); *Read* v. *Anderson* (4); *Carlill* v. *Carbolic Smoke Ball Co.* (5) go to shew that this is a contract which can be enforced by the successful competitors. A wager is the staking of money upon an uncertain event. If there be no uncertainty there cannot be a wager: *Hampden* v. *Walsh* (6). Here the event was certain, and therefore the competition is not a wager. Moreover, it is essential to a wager that each party must stand to win or lose. Here all the competitors might win or all might lose; so as between themselves there was no wager. Nor was there a wager between *Pearson* and the competitors, because he did not stand to win or lose. But even if it be a wager, it is not illegal, but only void. The fund is in the hands of the Defendant *Pearson* as a trustee, and he holds it upon a declared trust for a consideration, which is not illegal. That being so, he, as a stakeholder, is compellable at the suit of the competitors to execute the trust, and there is no ground upon which the Court will refuse to order administration of the fund. It is like the case of a settlement executed for a consideration which may turn out afterwards to be illegal: *Ayerst* v. *Jenkins* (7).

It may be suggested that competitions of this kind may do harm, and are contrary to public policy; but this Court has nothing to do with that, and is not called upon to sit as a Court of conscience upon such matters. If the Court should be of opinion that the money must be returned to the competitors, then a difficulty will arise, because all the coupons have been destroyed, and to enter upon an inquiry as to who contributed to the fund would probably exhaust the whole of it.

(1) 3 Camp. 168.
(2) 1 B. & Al. 683.
(3) 4 Q. B. D. 685.
(4) 10 Q. B. D. 100.
(5) [1892] 2 Q. B. 484.
(6) 1 Q. B. D. 189.
(7) Law Rep. 16 Eq. 275.

Hastings, Q.C., and *Eustace Smith*, for the Defendant *Pearson* :—

Mr. *Pearson* is in the position of a trustee, and does not desire to take any part in the argument. He desires, subject to the direction of the Court, to distribute the fund in accordance with the declared conditions of the competition.

Beale, Q.C., and *C. E. E. Jenkins*, for the Defendant *Hearn* :—

If it be necessary to distinguish as between lottery and wager, we submit that the competition is a lottery. If it be a wager, however, it is not a wager between the competitors and the Defendant *Pearson*; but it is a wager between each of the competitors. Each competitor was invited by the advertisement to enter into a wager with his co-competitors, the Defendant *Pearson* being in the position of a mere stakeholder. But whether it be a lottery or a wager, if we repudiate the contract before the money has been paid away by the stakeholder, we are entitled to have the amount of our contributions returned to us. It is said that the competition is not a lottery because there must have been an exercise of will or mind in the selection of the word; but in order to prevent its being a lottery there must be an exercise of intelligence or skill. Mere volition is not enough. If it were, then there could never be a lottery, for there must be an exercise of will power in the mere choice of a ticket. The word is arbitrarily chosen by the editor. The guessing at the word is the event upon which the competition is decided, and that was pure chance and makes it a lottery. It clearly comes within the definition given in all the dictionaries, viz., "a distribution of prizes by chance." There need not be a mechanical drawing of lots or casting of dice in order to constitute a lottery. The fact that the word is chosen before the commencement of the competition is not material: *Morris* v. *Blackman* (1); *Roddy* v. *Stanley* (2). The certainty of the event before the competition does not prevent its being a lottery. It is not suggested that in *Taylor* v. *Smetten* (3) the prizes were selected after the sale of the packets of tea; and there the transaction was held to be none the less a lottery because of the previous annexation of a prize.

(1) 2 H. & C. 912. (2) 5 Ir. Jur. 10.
(3) 11 Q. B. D. 207.

STIRLING, J.
1893
BARCLAY v. PEARSON.

According to the *Lottery Acts*, the question does not depend upon the absence or presence of a mechanical lot; but what is aimed at is the staking of money upon a chance. The history of those Acts is well given in *Brandt* on Gaming. The essential principle of a lottery is that there shall be a fair chance for every person taking part in it. *Caminada* v. *Hulton* (1) and *Taylor* v. *Smetten* (2) may be distinguished on the ground that there the competitors were not asked to stake or contribute anything. Moreover, it cannot be said that there is no room for the exercise of skill in the selection of the winning horses in a race. In this competition it was not possible to exercise any skill in the selection of the missing word.

Again, even if the competition is a wager, that does not prevent its also being a lottery.

Eltham v. *Kingsman* (3) shews clearly that either of the parties to a wager can, while the contract is still executory, recover his money from the stakeholder.

[*Buckley*, Q.C.:—If it be held to be a wager between the competitors, we do not dispute that those who have revoked the authority to pay over the stakes are entitled to have their money back: *Diggle* v. *Higgs* (4).]

We say that, if it be a wager, it is a wager between each and all of the competitors, and not between the competitors and the Defendant *Pearson*. He is merely a stakeholder. But it is contended that there is a trust, which will be enforced though it may be founded upon an illegal consideration, and *Ayerst* v. *Jenkins* (5) is relied upon. But that case was not followed in *Pawson* v. *Brown* (6). There is no difference between a wager and any other illegal contract in respect of the right to recover back money paid so long as the contract has not been executed: *Taylor* v. *Bowers* (7); *Wilson* v. *Strugnell* (8). That case was, no doubt, partly overruled in *Herman* v. *Jeuchner* (9); but only on the point as to the contract having been executed; and in

(1) 60 L. J. (M.C.) 116.
(2) 11 Q. B. D. 207.
(3) 1 B. & Al. 683.
(4) 2 Ex. D. 422.
(5) Law Rep. 16 Eq. 275.
(6) 13 Ch. D. 202.
(7) 1 Q. B. D. 291.
(8) 7 Q. B. D. 548.
(9) 15 Q. B. D. 561.

Kearley v. *Thomson* (1) the illegal contract had been partially performed. In *Tenant* v. *Elliott* (2) it was held that money had and received by *A.* to the use of *B.* could be recovered by *B.*, notwithstanding it was received by *A.* on an illegal contract between *B.* and *C.* And the same was held in *Farmer* v. *Russell* (3). See also *Camden* v. *Anderson* (4); *Langton* v. *Hughes* (5); *Webb* v. *Brooke* (6); *Clayton* v. *Dilly* (7); *Sykes* v. *Beadon* (8); and *Symes* v. *Hughes* (9).

We submit, first, that the competition is a lottery and illegal; and, secondly, that if it be a wager we are entitled, having revoked our authority to the Defendant *Pearson*, to recover our contributions. It is said that all the parties to the transaction are *in pari delicto*, and therefore none are entitled to recover anything; but we say that the *delictum* is not *par*, for the person who sets up the lottery is the chief offender and by statute is liable to much heavier penalties than those who take part in it. The Court will not have regard to any difficulty there may be in returning the money.

Buckley, in reply:—

The cases shew that if money has been paid for an illegal purpose, which has been partially performed, it cannot be recovered: *In re Great Berlin Steamboat Company* (10); *Kearley* v. *Thomson*; and *Taylor* v. *Bowers* (11). In all the *Lottery Acts* what is aimed at is the staking of money upon a pure chance, *i.e.*, a chance decided by lot or dice or things *ejusdem generis*, as distinguished from selection: *Chitty's* Statutes (12).

The competition is neither a lottery nor a wager, but a perfectly legitimate trust, which the Court will not refuse to administer.

[He also referred to *Jaques* v. *Golightly* (13); *Gatty* v. *Field* (14); and *Browning* v. *Morris* (15).]

(1) 24 Q. B. D. 742.
(2) 1 Bos. & P. 3.
(3) Ibid. 296.
(4) Ibid. 272.
(5) 1 M. & S. 593.
(6) 3 Taunt. 6.
(7) 4 Taunt. 165.
(8) 11 Ch. D. 170.
(9) Law Rep. 9 Eq. 475.
(10) 26 Ch. D. 616.
(11) 1 Q. B. D. 291.
(12) Vol. ii. pp. 1310, 1314, 1322.
(13) 2 Wm. Bl. 1073.
(14) 9 Q. B. 431.
(15) 2 Cowp. 790.

STIRLING, J. 1893. Feb. 9. STIRLING, J. (after stating the facts, continued):—

1893
BARCLAY v. PEARSON.

Under Order XXXIV., rule 1, I am at liberty "to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial;" and I draw the following inferences: (1.) It is of the essence of the competition that there should be several words which might more or less appropriately fill the gap in the paragraph. In the instance now in question a great number of words might, with perfect grammatical and logical propriety, be selected for the purpose. (2.) It is not of the essence of the competition that the word to which success attaches, or, as it is called, the "correct word," should be the most appropriate to fill the gap. In the present case many words appear to me more appropriate than "unaccountable." (3.) No clue is given to the mode in which, among the many words more or less appropriate, that to which success attaches is actually chosen. I infer that the selection is perfectly arbitrary, or, in other words, that it is made by chance, and is none the less so because the range of selection, though wide, is not unlimited. It appears to me (and it was not disputed in argument), that if this competition constituted a lottery within the meaning of 42 Geo. 3, c. 119, it was illegal; and it is, therefore, to be considered, in the first place, whether it was a lottery. In delivering the judgment of the Divisional Court in *Taylor* v. *Smetten* (1) Mr. Justice *Hawkins* says: "In *Webster's* Dictionary a lottery is defined to be a 'distribution of prizes by lot or chance,' and a similar definition is given in *Johnson*; such definitions are in our opinion correct, and in such sense we think the word is used in the statute." I am bound by that expression of opinion; but I think it right to say that I entirely agree with it. In the present case the competition is intended to end in a distribution of prizes—viz., shares in the fund contributed by all the competitors. Further, I think that the distribution takes place "by chance." In coming to that conclusion I have the guidance of a decision (which doubtless is not binding on me, but which appears to be perfectly correct) of the present learned and experienced magistrate at *Bow Street*, Sir *John Bridge*. He had to consider the case of a competition

(1) 11 Q. B. D. 207, 210.

conducted generally on a similar mode to that now in question, but with the following variations of detail: The word to which success attached was not fixed until after all the coupons had been sent in, and was then chosen by selecting from a bag one of twenty or thirty pieces of paper on which had been written words which were more or less appropriate solutions. The magistrate held that it was a scheme for distributing prizes by chance, and consequently a lottery. In giving judgment he is stated to have said (according to the report with which I have been furnished): "If the competition is decided by skill and judgment and not by chance, then it is not a lottery. . . . If competitors were asked to supply the word" (by which I understand him to mean the most appropriate word) "and not a word, it makes a difference. The defendants do not pretend to say that they call for the selection of the most fitting word with which to complete the sentence. The selection of the word must be entirely a matter of chance. On that ground the case comes within the meaning of the *Lottery Acts*." I agree with these observations, and think them applicable to the present case. Neither the circumstance that the word is determined before the competition begins, nor the circumstance that the mode of selection is unknown, appears to me to give rise to any real difference. It was urged that the chance or lot contemplated by the statute 42 Geo. 3, c. 119, must be *ejusdem generis* with those enumerated—viz., "dice, lots, cards, balls," or "numbers or figures." I think the use of a physical lot is form, not substance; the arbitrary, unfettered choice of the editor of *Pearson's Weekly* does not substantially differ from selection by means of the bag made use of in the competition which gave rise to the decision at *Bow Street*, and the latter was admitted to fall within the terms of the Act. In my opinion, therefore, the answer to the first question must be that the competition was illegal under the statutes against lotteries. This would dispose of the case were it not that the fund has been paid into Court, and it becomes necessary to consider though not absolutely to decide what are the rights of the unsuccessful competitors. The law on this subject has been recently considered by the Court of Appeal in the case of *Kearley* v. *Thomson* (1),

(1) 24 Q. B. D. 742, 745.

STIRLING, J.

1893

BARCLAY v. PEARSON.

where Lord Justice *Fry*, in the course of his judgment, lays it down thus: "As a general rule, where the plaintiff cannot get at the money which he seeks to recover without shewing the illegal contract, he cannot succeed. In such a case the usual rule is *potior est conditio possidentis*. There is another general rule which may be thus stated, that where there is a voluntary payment of money it cannot be recovered back. It follows in the present case that the plaintiff who paid the £40 cannot recover it back without shewing the contract upon which it was paid, and when he shews that he shews an illegal contract. The general rule applicable to such a case is laid down in the very elaborate judgment in *Collins* v. *Blantern* (1), where the Lord Chief Justice says: 'Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the Court to fetch it back again; you shall not have a right of action when you come into a Court of justice in this unclean manner to recover it back.' To that general rule there are undoubtedly several exceptions, or apparent exceptions. One of those is the case of oppressor and oppressed, in which case usually the oppressed party may recover the money back from the oppressor. In that class of cases the *delictum* is not *par*, and, therefore the maxim does not apply. Again, there are other illegalities which arise where a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class. Instances of that description are familiar in the case of contracts void for usury under the old statutes, and other instances are to be found in the books under other statutes, which are, I believe, now repealed, such as those directed against lottery keepers. In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other, notwithstanding that both have been parties to the illegal contract." Amongst the cases under the *Lottery Acts* referred to by Lord Justice *Fry*, that of *Browning* v. *Morris* (2), which was decided in 1778, may be one. That was an action in which the plaintiff and the defendant were both lottery office keepers, and it was brought by one against the other in order

(1) 1 Sm. L. C. 7th Ed. p. 369. (2) 2 Cowp. 790, 792.

to recover money paid upon an illegal transaction or contract. Lord *Mansfield*, L.C.J., said: "The rule is *in pari delicto potior est conditio defendentis.* And there are several other maxims of the same kind. Where the contract is executed, and the money paid *in pari delicto*, this rule, as Mr. *Dunning* contended, certainly holds; and the party who has paid it, cannot recover it back. For instance, in bribery, if a man pays a sum of money by way of a bribe, he can never recover it in an action; because both plaintiff and defendant are equally criminal. But, where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not *in pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract." These words "after the transaction is finished and completed" are very important. Then the Lord Chief Justice refers to the statute to prevent bad practices upon bankrupts. That statute, says the Lord Chief Justice, "prohibits 'taking any money or security from the bankrupt himself, or any person on his behalf, as the consideration for signing his certificate.' Suppose a creditor refuses, unless the bankrupt consents to give him a sum of money. The bankrupt gets the money from a friend or relation, and the creditor, in consequence, signs the certificate. The bankrupt renews his trade, and receives every advantage he can derive from having obtained his certificate. He may notwithstanding bring his action and recover the money back. And this, though he has acted contrary to a law made for his own benefit;" and the judgment concludes: "It is true, that in these cases, the Court will not assist the party who makes the illegal contract to recover any money he may win of the office keeper; but he shall have his action for all the money which the office keeper has got from him." It then appeared that the plaintiff was himself a lottery office keeper, and *in pari delicto* with the defendant, and on that ground it was held that the money paid by the plaintiff could not be recovered. I think that that case is an authority for holding in the present case that the

STIRLING, J. 1893 BARCLAY v. PEARSON.

competitors are a class protected by statute, and that in the absence of special circumstances, each unsuccessful competitor is entitled, notwithstanding that the competition is finished and the prize-winners ascertained, to bring an action at law for the recovery of what was paid by him to the Defendant *Pearson*, and would be so entitled even if the fund had been distributed. Supposing, however, that the competitors do not form a class protected by statute, I still think that, according to the authorities, an action might be maintained by a competitor who gave notice that he required repayment of his contribution before the Defendant *Pearson* parted with the fund. It was argued that, according to *Kearley* v. *Thomson* (1), the unsuccessful competitor could not recover, because there had been part performance of the illegal contract; but that argument leaves out of consideration the material fact that in this case Mr. *Pearson* was in the position of a stakeholder. It is established that where money is deposited with a stakeholder under a contract which is merely null and void (as in the case of a wager) the money can be recovered by a depositor if demanded from the stakeholder before it is paid over: *Diggle* v. *Higgs* (2); and a similar rule appears to hold where the contract is illegal. That point is covered by the cases of *Hastelow* v. *Jackson* (3) and *Hodson* v. *Terrill* (4). *Hastelow* v. *Jackson* was an action in which the plaintiff and one *Wilcoxon* deposited money in the hands of a stakeholder to abide the event of a boxing match between them, and after the battle the plaintiff demanded the whole sum from the stakeholder, and threatened him with an action if he paid it over to *Wilcoxon*. This he nevertheless did by the direction of the umpire, and it was held that the plaintiff was entitled to recover from him his own stake as money had and received to his use. Mr. Justice *Littledale* stated the law very clearly and shortly thus (5): "If two parties enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards. In the case of persons entering into such a contract and paying money to a

(1) 24 Q. B. D. 742.
(2) 2 Ex. D. 422.
(3) 8 B. & C. 221.
(4) 1 C. & M. 797.
(5) 8 B. & C. 226.

stakeholder, if the event happens and the money is paid over without dispute, that is considered as a complete execution of the contract, and the money cannot be reclaimed; but if the event has not happened, the money may be recovered. With respect to a stakeholder there is a third case, viz., where the event has happened, but before the money has been paid over, one party expresses his dissent from the payment. Under such circumstances he may recover it; and perhaps it may then be said, that although the event has happened, yet the contract is not completely executed until the money has been paid over, and therefore the party may retract at any time before that has been done." That case was followed in *Hodson* v. *Terrill* (1), where Baron *Bayley*, in commenting upon it, says: "It was suggested in argument that if the stake was illegal the deposit was equally illegal, and that the maxim *melior est conditio possidentis* applied. In *Hastelow* v. *Jackson* (2), the wager was clearly illegal, the subject of it being a boxing match, and yet there it was held that the plaintiff was entitled to recover from the stakeholder, who had paid over the money after notice, his own stake, as money had and received to his use. That shews that the right of the party making the deposit to recover back the money was not taken away by reason of the illegality." These two cases have been repeatedly recognised as stating correctly the law on the subject, and according to them, notwithstanding the illegality of the contract, an action may be maintained against the Defendant, regarded simply as a stakeholder, by a contributor who has, before the money is paid over, given him notice not to part with his contribution, although the notice is not given until after the event has happened on which the stakes were to be paid over. It is, however, essential to the title of the person so seeking to recover that he should give notice of his claim to the stakeholder before he parts with the fund in his hands.

By the second question the opinion of the Court is asked whether the competitors are entitled (subject to such provision as to costs as the Court may think just) to have the sum of £23,628 14*s.* returned to them, and how such return is to be

(1) 1 C. & M. 804. (2) 8 B. & C. 221.

STIRLING, J.
1893
BARCLAY v. PEARSON.

made. This question, be it observed, is put in an action for administration of the trusts of the money in Court. Now, in my opinion, these moneys are not affected by any trust which the Court can administer. So far as they are impressed with any trust, it is one which has arisen out of an illegal transaction, and neither the Plaintiff nor the Defendant *Pearson* is entitled to the assistance of the Court in administering it. The right of each unsuccessful competitor to obtain a return of his contribution is a legal right, enforceable by action at law, to which, if founded on the principle laid down in *Browning* v. *Morris* (1), the payment into Court in this action would appear to be no defence. Further, I think that the Court should be very slow to lend its assistance towards extricating any person from difficulties in which he has become involved by embarking in transactions prohibited by a statute passed for the protection of the public against imposition. In the present case there are some special circumstances which may, I think, be taken into consideration in determining what is to be done with the fund in Court. In the first place, the Defendant *Hearn* is made a party simply as a person interested in resisting the claim of the Plaintiff; he has brought no independent action, nor made any counter-claim in this. His claim is for a very small sum, and it is not stated, and I have no reason to believe that any other competitor has claimed a return of his contribution. As regards the Defendant *Pearson*, no imputation is or can be made on his good faith or honesty. He appears to have carried through a large number of competitions without any interference, and the abrupt termination of the competition in question was brought about by the criminal proceedings against another person to which I have already referred. He is in some difficulty through having destroyed the coupons of the unsuccessful competitors; but no claim is now made to the fund by any person except those represented by the Plaintiff and the Defendant *Hearn*. Under these circumstances, it would seem the best and simplest course that the fund should be returned to the Defendant *Pearson*, who will then be able to defend himself by means of it against any legal claim, and to dispose of the surplus in such way as he may

(1) 2 Cowp. 790.

deem himself in honour bound to apply it. If, however, this course should not commend itself to him, I am willing, in this particular case, and without establishing a precedent, that the fund should remain in Court, whereby there will accrue a benefit, in the first place, to the legal profession, and ultimately, I hope, to the public, in whose favour it may be fairly expected that there will result, at some date more or less remote, an extinguishment of some portion of the National Debt.

Feb. 10. On the application of the Defendant *Pearson* the fund was ordered to be paid out to him upon his undertaking to pay the costs of the action as between solicitor and client.

Solicitors for Plaintiffs: *Sutton, Ommanney, & Rendall.*
Solicitors for Defendant *Pearson*: *Harrison & Davis.*
Solicitors for Defendant *Hearn*: *Saunders, Hawksford, Bennett & Co.*

G. A. S.

READ *v.* WOTTON.

STIRLING, J.
1893
Feb. 18.

[1893 R. 242.]

Practice—Cause of Action—Recovery of Land—Joinder of Claim for Injunction—Rules of Supreme Court, 1883, *Order* XVIII., *r.* 2; *Order* XXXVI., *r.* 58.

The writ in an action was indorsed (1.) to recover possession of a house; (2.) for arrears of rent and mesne profits; (3.) for an injunction to restrain the Defendants from doing upon the house any act which might be or become a nuisance to the Plaintiff contrary to the provisions of a lease granted by the Plaintiff to the Defendants; and (4.) damages. Before the statement of claim had been delivered, the Defendants moved to set aside the writ upon the ground that the Plaintiff had not, before issue thereof, obtained leave for the joinder of the cause of action for the injunction with the cause of action for the recovery of land:—

Held, that though a perpetual injunction, if claimed by the statement of claim, when delivered, might possibly be inconsistent with the terms of rule 2 of Order XVIII., an interlocutory injunction, being only a substitute for damages between the issue of the writ and the trial, was not inconsistent with such rule; and *held* also, that upon the face of the writ there was no infringement of the rule, and that the motion must be refused.

THE writ in this action was issued on the 3rd of February, 1893, and was indorsed as follows:—

"The Plaintiff's claim is,

STIRLING, J.
1893
READ
v.
WOTTON.

"1. To recover possession of the house, shop, and premises, No. 5, *The Parade, London Road, Croydon, Surrey.*

"2. And for arrears of rent and mesne profits.

"3. For an injunction to restrain the Defendants, their, or either of their servants, agents, under-tenants, occupiers, and workmen from doing or suffering to be done upon the said house and shop and premises, or any part thereof, any act or thing whatsoever which may be or become an annoyance, nuisance, or damage to the Plaintiff, or any of her tenants in the neighbourhood, contrary to the provisions of the lease granted by the Plaintiff to the Defendants, dated the 31st of August, 1886.

"4. Damages.

"5. Costs."

The Defendants had entered an appearance and had demanded the delivery of a statement of claim, but none had as yet been delivered.

The Plaintiff now moved, pursuant to notice served on the 7th day of February, for an injunction to restrain the Defendants until trial from doing anything on their premises which might be or become a nuisance to the Plaintiff, contrary to the provisions of the lease from the Plaintiff to the Defendants; and from continuing a wax-works exhibition thereon.

The Defendants had, on the 14th of February, served a cross-notice of motion for an order that the writ might be set aside on the ground that the Plaintiff had failed to obtain leave before the issue of the said writ for the joinder of the cause of action relating to the injunction claimed by the writ with the cause of action for the recovery of possession of the house and premises by the writ also claimed.

Beddall, for the Plaintiff.

Keary, for the Defendants:—

I take the preliminary objection that the writ in this action ought to be set aside as contravening Order XVIII., rule 2, by reason of the joinder with an action for the recovery of land of another cause of action not falling within the exception in the

rule, without leave having been first obtained from the Court for the purpose.

There are here, upon the face of the writ, two distinct causes of action, viz. (1.) past breach of covenants, which is the foundation of the action for recovery of possession, arrears of rent, and damages; and (2.) continuing breach of covenant after action brought upon which the claim for an injunction is based: *Hambling* v. *Wallani* (1).

Beddall:—

There is only one cause of action. The Plaintiff claims damages for breach of covenant, and the injunction is only asked for as incidental relief: *Kendrick* v. *Roberts* (2); *Gledhill* v. *Hunter* (3). Moreover, by appearing and demanding a statement of claim, the Defendants have waived any objection. In *Hambling* v. *Wallani* there was no claim for damages.

Keary, in reply:—

In Order XVIII., rule 2, "damages" must be read as meaning damages which have accrued before action is brought.

STIRLING, J.:—

This is an application to set aside the writ in the action on the ground that it is not in conformity with Order XVIII., rule 2, which provides that "no cause of action shall unless by leave of the Court or a Judge be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed."

Now, it is to be observed, that in this case there is no statement of claim, and I have to refer simply to the writ. [His Lordship read the indorsement on the writ, and continued:—]

I am called upon to say that that writ is not in conformity with the rule. It appears to me that in the absence of any

(1) W. N. (1889) 133. (2) 30 W. R. 365.
(3) 14 Ch. D. 492.

STIRLING, J.
1893
READ
v.
WOTTON.

statement of claim it does fall within the express words of the rule, for in an action for the recovery of land it allows claims to be joined "in respect of mesne profits or arrears of rent or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held."

There is in this writ a claim for damages, and under Order XXXVI., rule 58, "Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment."

Consequently, if it is proved at the trial that there has been a breach of the contract under which the premises are held before action brought, continuing at the time when the action is brought, and down to the trial, damages may be assessed down to not only the issue of the writ, but to the time of assessment.

What is claimed is an injunction. If there were a statement of claim there might be relief asked inconsistent with the rule. A perpetual injunction might possibly be inconsistent; but it seems to me that an interlocutory injunction is within the terms of the rule, for it is a mere substitute for the damages which might be assessed for the continuing breach between the issue of the writ and the trial of the action. The claim for an injunction is made "in respect of damages for the breach of any contract under which the premises are held." The writ so understood falls within the terms of the rule, and the preliminary objection therefore fails. The motion to set aside the writ must be dismissed with costs, to be the Plaintiff's costs in any event.

On the Plaintiff's motion his Lordship granted an interlocutory injunction.

Solicitor for Plaintiff: *J. R. Pakeman.*
Solicitor for Defendants: *H. Letts.*

W. W. K

CHRISTIE *v.* TAUNTON, DELMARD, LANE AND COMPANY.

STIRLING, J.

1893

Jan. 26, 31; *Feb.* 25.

[1890 C. 4191.]

In re TAUNTON, DELMARD, LANE AND COMPANY.

[1892 T. 4304.]

Company—Winding-up—Shares, Calls on—Debentures, Equitable Assignment of—Set-off—Notice—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 75.

In March, 1890, *T.*, who held shares and debentures in a company, deposited debentures with the Plaintiffs, who were bankers, to secure a debt. The debentures were not on the face of them payable until the 31st of December, 1890; but by the indorsed conditions, in the event of the winding-up of the company, the principal moneys secured by the debentures became immediately due and payable. On the 3rd of November, 1890, a call was made upon *T.*'s ordinary shares payable on the 20th of November. By the articles of the company this call was deemed to have been made at the time when the resolution to make it was passed. On the 6th of November, 1890, the Plaintiffs gave the company notice of *T.*'s assignment, and such notice was entered by the company on the register of debentures. On the 12th of November the Plaintiffs commenced a debenture-holder's action against the company, and on the 19th of November the company went into voluntary liquidation. In the winding-up further calls were made upon *T.*'s shares. Upon a summons taken out by the Plaintiffs in the action and in the winding-up the company claimed the right to set off the calls due from *T.* as against the sum due upon the debentures:—

Held, that in respect of the call made before the winding-up the company were entitled to set-off; but in respect of the calls made in the winding-up they were not so entitled.

THIS was a summons taken out in a debenture-holder's action, and in the winding-up of the company, for the determination of the question whether calls made by the company on certain shares, which at and previously to the commencement of the winding-up stood in the name of *Richard Hobbs Taunton*, could be set off against what was due on certain debentures, which were originally issued to *Taunton* and registered in his name, but which he had assigned in equity to the Plaintiffs, the *Birmingham and Midland Bank, Limited.*

STIRLING, J.
1893
CHRISTIE v. TAUNTON, DELMARD, LANE AND COMPANY.
In re TAUNTON, DELMARD, LANE AND COMPANY.

The company was incorporated under the *Companies Acts* on the 29th of January, 1889, the share capital being £125,000 divided into shares of £10 each, some of which were preference and the others ordinary shares. The articles of association contained a series of clauses relating to the making of calls, one of which (art. 15) provided that "a call shall be deemed to have been made at the time when a resolution of the directors authorizing such call was passed." The company raised money on debentures, and Mr. *Taunton* became entitled to, and the registered holder of, a large number of such debentures. On the 24th of January, 28th of January, and 5th of March, 1890, he deposited debentures of the nominal value in the aggregate of £5250 with the *Birmingham and Midland Bank, Limited,* by way of security for a debt, and executed a memorandum of deposit and a blank transfer to trustees for the bank; but no notice of such deposit or transfer was then given to the company. Subsequently the company issued fresh debentures, and agreed to exchange those previously issued to *Taunton* for debentures of the new issue of equal nominal amount; and the bank, to enable this exchange to be carried into effect, gave up the old debentures to *Taunton,* who, on the 3rd of September, 1890, deposited with the bank those which he had received in substitution.

None of these new debentures became payable at an earlier date than the 31st of December, 1890. They were in the following form:—

"(1.) *Taunton, Delmard, Lane and Company, Limited* (hereinafter called the company), are indebted to *Richard Hobbs Taunton,* of *Brooke Vale, Witton,* near *Birmingham,* in the sum of £500, and hereby bind themselves to pay the said *Richard Hobbs Taunton,* or other the registered holder for the time being of this debenture, the said sum of £500 on the 31st of December, 1890, or on such earlier date as the same shall become payable, in accordance with the conditions indorsed hereon, and to pay interest thereon in the meantime from the date hereof at the rate of six per cent. per annum, such interest to be paid quarterly on the 1st day of January, and the 1st day of April, and the 1st day of July, and the 1st day of October in every year, the

first of such payments, or a proportionate part thereof, to be made on the 1st day of October, 1890. (2.) The company hereby charge the undertaking of the company, and all the real and personal property now, or at any time hereafter, belonging to the company, exclusive of unpaid calls and uncalled capital, with the payment of the principal moneys and interest hereby secured to the intent that the charge hereby created may (subject to the prior charge already created by the issue of one hundred prior mortgage debentures for securing the sum of £100 each, with interest at the rate of five per cent. per annum, but in priority to and free from all other mortgages or charges created by the company on its undertaking, or property, or any part thereof) operate as a charge on such property *pari passu* with the charge created, or to be created, by any other debentures of the same series, and so that the same shall be a floating charge not interfering with the disposition of such property in the ordinary course of the business of the company, but attaching to such business as it exists when the said security shall be enforced. (3.) This debenture is issued subject to the conditions indorsed hereon."

The material conditions were as follows:—

"2. The company shall keep a register at its registered office of the debentures of this series, wherein shall be entered the names and addresses of the holders of such debentures, and particulars of the debentures held by them respectively, and such register shall at all reasonable times be open to the inspection of the registered holder of this debenture and his personal representatives.

"3. The registered holder for the time being of each debenture of this series shall alone be deemed to be entitled to the principal moneys and interest thereby secured, and the company shall not be bound to enter in the register or recognise in any way any trust or equity at any time affecting such debenture, or any principal moneys and interest thereby secured, and the receipt of the registered holder shall be an effectual discharge for any such moneys."

"6. Every transfer of any debenture of this series shall be in

STIRLING, J.
1893
CHRISTIE v. TAUNTON, DELMARD, LANE AND COMPANY.
In re TAUNTON, DELMARD, LANE AND COMPANY.

writing under the hand of the registered holder, and upon production of such transfer, together with such evidence of title as the directors may reasonably require, the transferee shall be registered as the holder of such debenture."

"8. The company shall in no case be entitled to create any new specific mortgage or charge on any freehold, leasehold, or other property hereby charged in priority to the charge created by the debentures of this series; but, save as aforesaid, the company shall be able to deal with, and dispose of, the whole of the property hereby charged in the ordinary course of the business of the company as it thinks fit."

"9 (*c*). If an order be made by a Court of competent jurisdiction, or a resolution of the company (valid for that purpose) be duly passed for the winding-up of the company, then and in any of such cases the whole of the principal money secured by all the debentures of this series then outstanding shall immediately become due and payable."

No fresh memorandum of deposit or transfer of any kind was executed by *Taunton* on the occasion of the deposit of the new debentures with the bank. In and prior to January, 1890, and thenceforth down to the commencement of the winding-up, *Taunton* was the holder of 1567 ordinary shares, on which previously to October, 1890, £8 10*s*. only had been paid up. On the 25th of October, 1890, *Taunton* paid to the company £250 in advance of calls on those shares, and again on the 1st of November, 1890, he paid the company a sum of £600, also in advance of calls. On the 3rd of November a resolution was passed by the directors that a call of £1 per share be made on the ordinary shares, payable on the 20th of November at the *Birmingham and Midland Bank*, who were the company's bankers. On the 4th of November notice of this call was given to the bank, who were authorized to retain the proceeds in payment of an overdraft. On the 6th of November, 1890, the bank gave the company formal notice that the debentures had been deposited by *Taunton* by way of security; and the secretary of the company without consulting the directors, entered notice of the deposit on the register of debentures, and informed the bank that he had so done.

On the 12th of November, 1890, the action of *Christie and Others* v. *Taunton, Delmard, Lane and Company, Limited,* was brought by the bank and their officials as holders of certain debentures issued directly to them. On the 19th of November, 1890, the company passed, and on the 5th of December, 1890, confirmed a special resolution that the company should be wound up voluntarily. In the action assets of the company had been realized sufficient to pay the debentures in full. In the winding-up there had been called up all that remained unpaid on *Taunton's* shares, but he had not paid any part of such calls. In the action a sum of £1743 11*s.* 4*d.* had been carried over to the joint account of the liquidator of the company and the bank to abide the result of the present summons, which was taken out by the bank, and by which they asked for payment out to them of the whole sum.

Beale, Q.C., and *W. Baker,* for the bank:—

There is no right of set-off which can prevail against our claim.

The debentures were properly assignable, and the company are bound by the assignment to us: *Binney* v. *Ince Hall Coal and Cannel Company* (1). The form of the debentures is immaterial, because the company have accepted the notice. At the time when the assignment was made there was no debt due and payable. At the date of the notice even there was no debt due and payable, for the company could not then sue for the call which was payable at a later date. The question here is one of the right to set-off, not of any trust or equity affecting the debentures; nor is there any estoppel. No consideration was given after the receipt of the notice; so that the case does not turn upon the equitable doctrine of advancing money without notice.

It is sought to extend the doctrine of set-off beyond what is warranted by the cases: *Ex parte Swan* (2); *Brunton's Claim* (3); *Higgs* v. *Northern Assam Tea Company* (4); *Cavendish* v. *Geaves* (5); *Ex parte Mackenzie* (6).

(1) 35 L. J. (Ch.) 363.
(2) Law Rep. 6 Eq. 344.
(3) Ibid. 19 Eq. 302.
(4) Law Rep. 4 Ex. 387.
(5) 24 Beav. 163.
(6) Law Rep. 7 Eq. 240

STIRLING, J.
1893
CHRISTIE v. TAUNTON, DELMARD, LANE AND COMPANY.
In re TAUNTON, DELMARD, LANE AND COMPANY.

In the present case the right of set-off was gone at the date of the assignment, but if not then, at any rate at the date of notice: *Watson* v. *Mid-Wales Railway Company* (1).

Buckley, Q.C., and *Kirby*, for the liquidator:—

The bank did not complete their title until the 6th of November. At that date there was a debt owing upon the debentures by the company to *Taunton*, such debt being payable at a future date; and there was also a debt owing by *Taunton* to the company in respect of calls upon his shares. The call made on the 3rd of November constituted a debt due from *Taunton*, though not payable till the 20th, and the right to set-off is therefore clearly established: *Watson* v. *Mid-Wales Railway Company*; *Williams* v. *Harding* (2); *Ex parte Mackenzie* (3); *Jeffryes* v. *Agra and Masterman's Bank* (4).

The calls made in the winding-up stand in the same position, being made in respect of the original liability on the shares. On the 6th of November, the date of the notice, *Taunton* was indebted in respect of the shares: *Companies Act*, 1862, s. 75; *Grissell's Case* (5).

The assignment was subject to the right to set-off: *Judicature Act*, 1873, s. 25, sub-s. 6.

Our right to set-off extends to anything that would have been provable in bankruptcy: *Judicature Act*, 1875, s. 10.

The company never accepted the assignment to the bank: *New London and Brazilian Bank* v. *Brocklebank* (6); *Bradford Banking Company* v. *Briggs* (7).

Under the conditions of the debentures the company could only have accepted the assignment subject to the right to set off.

Beale, in reply:—

The date of the assignment is the date to be considered, and not the date of notice.

(1) Law Rep. 2 C. P. 593.
(2) Ibid. 1 H. L. 9.
(3) Ibid. 7 Eq. 240.
(4) Law Rep. 2 Eq. 674.
(5) Ibid. 1 Ch. 528.
(6) 21 Ch. D. 302.
(7) 12 App. Cas. 29.

1893. Feb. 25. STIRLING, J. (after stating the facts, continued):—

STIRLING, J.
1893
CHRISTIE v. TAUNTON, DELMARD, LANE AND COMPANY.
In re TAUNTON, DELMARD, LANE AND COMPANY.

I have to consider, first of all, whether what remains due of the call of £1 made on the 3rd of November, 1890, can be set off. Under clause 9 of the conditions indorsed upon the debentures the principal secured thereby became payable on the 5th of December, 1890. The conditions shew that the debentures were meant to be assignable. There is no evidence that the debts in respect of the debentures and of the shares originated in the same contract or transaction; on the contrary, they seem to have originated quite independently, and consequently set-off cannot be claimed on any such grounds as prevailed in the case of *Government of Newfoundland* v. *Newfoundland Railway Company* (1). The bank never presented to the company any transfer which would have entitled them under the conditions indorsed on the debentures to be registered as the holders of those deposited by *Taunton*; all they did was to give notice to the company of the equitable deposit having been made. The conditions provide that "the company shall not be bound to enter in the register or recognise in any way any trust or equity at any time affecting such debenture." On behalf of the bank it is contended that the rights of equitable assignees cannot be overridden by such a provision. I think it unnecessary on the present occasion to decide whether that contention is well founded or not—for in fact the company did enter notice of the bank's title on the register; and the bank must, I think, be taken to stand in the position of equitable assignees of a *chose in action* who have given notice of their assignment. What, then, is that position? I consider it first on the supposition that the company had not gone into liquidation, but was now sued by the assignees of the debentures. On the one hand the case of *Watson* v. *Mid-Wales Railway Company* (2) shews that after notice of an equitable assignment of a *chose in action* the debtor cannot set off as against the assignee a debt which accrues due subsequently to the date of notice, even although that debt may arise out of a liability which existed at and previously to the date of notice. On the other hand, the case of *Wilson* v. *Gabriel* (3) shews that

(1) 13 App. Cas. 199. (2) Law Rep. 2 C. P. 593. (3) 4 B. & S. 243.

STIRLING, J.

1893

CHRISTIE v. TAUNTON, DELMARD, LANE AND COMPANY.

In re TAUNTON, DELMARD, LANE AND COMPANY.

the debtor may set off, as against the assignee, a debt which accrued due before notice of the assignment.

It may be right to consider the principle on which the decision in the latter case was based. The action was one for freight; the defendants pleaded a set-off, to which the plaintiff replied, on equitable grounds, that while the freight was in course of being earned, he assigned it for value to a firm of *Early & Smith*, of which the defendants, before the debt became due and before the action was brought, had notice; and that the plaintiff was suing only as trustee for *Early & Smith*; but the replication did not state that the defendants had notice of the assignment before the subject-matter of the set-off accrued due, and it was held that the replication was no answer to the plea. For the grounds of the decision I refer to the judgment of Mr. Justice *Blackburn*, which is as follows (1): "The plaintiff here sues for a debt, and the defendants plead a set-off. There was a debt due when the action commenced, and therefore at law the defendants have a perfect right to set off against it a debt due to them. Messrs. *Early & Smith*, the real plaintiffs in the cause, call on us to do, what they otherwise would have called on a Court of Equity to do, namely, grant an injunction to prevent this; for that is what this replication amounts to. It is not, as Mr. *Brown* contends, that we are to see affirmatively that this is an equitable set-off; but we are to see whether the plaintiff has a right to ask a Court of Equity to prevent the defendants setting up their legal right of set-off. Equity never will do that when equities are equal. The contract under which the freight ripened into a debt was, before it became one, assigned for money to Messrs. *Early & Smith*, and the defendants had notice of that. It is perfectly clear in equity that, from the moment the assignment of a *chose in action* is notified to the party concerned, the assignee is the owner of that contract and all belonging to it. Here Messrs. *Early & Smith* allowed the plaintiff to appear to be the true owner of this freight, and upon that what was the right between them and the other party, either by natural equity or the artificial thing we call by the name of equity? So early as *George* v. *Clagett* (2), the ground of which is correctly stated in

(1) 4 B. & S. 247. (2) 7 T. R. 359.

the well-considered judgment of the Exchequer in *Isberg* v. *Bowden* (1), it was held that where a factor sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against a demand in respect of those goods made by the principal. I quite agree in what Mr. *J. W. Smith* says in the beginning of his note (2), 'This decision too clearly results from principles of natural equity to need much discussion or explanation.' This replication is therefore bad."

In *Isberg* v. *Bowden* the law with respect to principal and agent is thus stated: "Where a principal permits an agent to sell as apparent principal, and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the real contracting party, and is entitled to the same defence, whether it be by Common Law or by statute, payment or set-off, as he was entitled to at that time against the agent, the apparent principal."

I think that if the company were being sued by the bank, it would be entitled to be placed in the same position as it occupied relatively to *Taunton* on the 6th of November, 1890, on which day *Taunton* was indebted to the company for calls payable on the 20th of November, while the company was indebted to *Taunton* on the debentures, which did not become payable until a later date. If, then, no winding-up had intervened, and *Taunton*, or the bank in *Taunton's* name, had sued on the debentures, the question would be whether the company could set off the debt which accrued due on the 3rd of November (the date of the call), but did not actually become payable until the 20th of November. Neither *Watson* v. *Mid-Wales Railway Company* (3) nor *Wilson* v. *Gabriel* (4) covers this point so far as actual decision goes; for, in the former, no debt had accrued due to the defendants at the date of notice, and in the latter the debt at the date of the notice appears to have been both due and payable. I think, however, on the principles laid down by *Blackburn*, J., in *Wilson* v. *Gabriel*, the set-off ought to be admitted. If it be inquired whether a Court of Equity would, in an action at law brought

(1) 8 Ex. 852, 859.
(2) 2 Sm. L. C. 5th Ed. p. 108.
(3) Law Rep. 2 C. P. 593.
(4) 4 B. & S. 243.

STIRLING, J.

1893

CHRISTIE v. TAUNTON, DELMARD, LANE AND COMPANY.

In re TAUNTON, DELMARD, LANE AND COMPANY.

before the *Judicature Acts*, have interfered by way of injunction to prevent the company from setting up the legal right of set-off, I think the answer must be in the negative. The bank not only neglected to take advantage of the conditions of the debentures by obtaining a transfer capable of registration, but did not even perfect the equitable title by giving notice until after the debt had accrued due and, what is still stronger, until after the bank had notice that it had so accrued. Again, if recourse be had to the analogy of the rule laid down in *George* v. *Clagett* (1), I think that, if the set-off were not admitted, the company would be placed in a less favourable situation as against the bank than was its position as regards *Taunton*; and it is to be observed that in *George* v. *Clagett* it appears from the report that the plaintiff, the undisclosed principal, gave notice of his title to the defendants on the 20th of November, 1795, and that the defendants were allowed to set off a bill which was payable two months after the 24th of September, 1795, and was consequently not actually due on the 20th November, the date of the notice. I think, therefore, that in any action brought by the bank on the debentures the company must have been allowed to set off the amount due in respect of the call made on the 3rd of November, 1890. It follows that a similar set-off must be allowed upon a proof against the company in the winding-up: *Mersey Steel and Iron Company* v. *Naylor* (2). Here, as I understand, the bank claims against the property which formed the subject of the security; but I apprehend that in such case the set-off might, under the procedure of the Court of Chancery, have been claimed by a cross-bill (see *Dodd* v. *Lydall* (3)), and, under the present practice, by a suitable pleading; and as the parties agree that the question to be determined is one of right and not of procedure merely, I think that the set-off must be admitted as regards the balance remaining unpaid of the call made on the 3rd of November, 1890.

I have next to deal with the calls made in the winding-up. The claim to set-off in respect of those is based on the 75th section of the *Companies Act*, 1862: "The liability of any person

(1) 7 T. R. 359. (2) 9 Q. B. D. 648, 667, 668; 9 App. Cas. 434.
(3) 1 Hare, 333.

to contribute to the assets of a company under this Act in the event of the same being wound up, shall be deemed to create a debt (in *England* and *Ireland* of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability." It is said that, as the event of the company being wound up has occurred, the call in question must be taken to be a debt which accrued due before notice of the assignment, though it did not become payable until a later date, and consequently must be set off in the same way as the call made on the 3rd of November, 1890. I think, however, that until the winding-up commenced there existed, in respect of this call, merely a liability on the part of *Taunton*, and consequently that this portion of the case is governed by the decision in *Watson* v. *Mid-Wales Railway Company* (1). I do not think that this conclusion conflicts with the case of *Ex parte Mackenzie* (2), for there the assignment did not take place until after the commencement of the winding-up, and consequently, in my view, after the liability had ripened into a debt. Lord *Romilly* says (3): "Of course no question arises where the assignment takes place before the winding-up; but if the winding-up should take place before the assignment of the *chose in action*, then, in my view of the case, it is provided that after the winding-up has taken place, and before any calls are made, the owner of the debenture shall not be at liberty to assign it, and get money which he can dispose of, so that when the call is made he has nothing which can be made available to pay it." I understand his Lordship there to intimate that if, in the case with which he had to deal, the assignment had taken place before the winding-up, his decision would have been different.

I think, therefore, that the set-off cannot be admitted as regards the calls made in the winding-up.

Solicitors for bank: *Beale & Co.*

Solicitors for liquidator: *Field, Roscoe, & Co.*, agents for *Smith, Pinsent, & Co., Birmingham.*

(1) Law Rep. 2 C. P. 593. (2) Law Rep. 7 Eq. 240.
(3) Law Rep. 7 Eq. 244.

G. A. S.

KEKEWICH, J.

1892 Dec. 13, 14, 15; 1893 Jan. 12, 13, 17; Feb. 4.

NATIONAL TELEPHONE COMPANY *v.* BAKER.

[1892 N. 2.]

Nuisance—Electricity—Damage—Telephone Company—Tramway Company—Right of Action—Statutory Powers—Provisional Order.

A man who creates on his land an electric current for his own purposes, and discharges it into the earth beyond his control, is on the principle of *Fletcher* v. *Rylands* (1) as responsible for damage caused by that current as he would have been if, instead, he had discharged a stream of water. Where the act is done in pursuance of a provisional order of the Board of Trade, it is protected to the same extent as other nuisances under statutory authority.

A tramway company, acting under a provisional order and using the best known system of electrical traction, caused electrical disturbance in the wires of a telephone company acting under license from the Postmaster-General:—

Held, that the tramway company are protected from liability for nuisance.

THIS action was brought by the *National Telephone Company, Limited*, and by *Charles Lupton*, one of their telephone exchange subscribers at *Leeds*, to restrain the Defendant from so working his electric tramway as to occasion a nuisance to the Plaintiffs' telephone lines, and for damages.

The Plaintiff company carried on an extensive business throughout the *United Kingdom*, under license from the Postmaster-General for a term of years, in supplying telephonic communication, principally by what was called the "Telephone Exchange" system. The system was worked on what was known as the "single-wire" system, the electric circuit being completed by the earth—that is, each end of the wire passed into the earth, which thus acted as a return conductor.

The company's exchange at *Leeds* had been in operation since 1880, and there were now 1200 subscribers and separate wires.

By a provisional order called the *Leeds* Corporation Tramways Order, 1888, confirmed by the *Tramways Orders Confirmation (No. 1) Act*, 1888, the provisions of the *Lands Clauses Acts* (except with respect to the purchase and taking of lands otherwise than

(1) Law Rep. 1 Ex. 265; 3 H. L. 330.

by agreement, and with respect to the entry upon lands by the promoters of the undertaking), and of the *Tramways Act*, 1870, were (sect. 2) incorporated with that order, except where expressly varied. By sect. 6 the corporation of *Leeds*, therein called "the promoters," were authorized to construct certain specified tramways with all proper rails, works, and conveniences.

Sect. 16 was as follows: "The carriages used on the tramways may, subject to the provisions of this order, be moved by animal power, and, with the consent of the Board of Trade, to be signified in writing, during a period of seven years after the opening of the same for public traffic, by means of haulage with wire ropes or other appliances placed underground, or by means of electric power, pneumatic power, and steam power, or any mechanical power, and, with the like consent during such further periods of seven years as the said board may from time to time specify in any order to be signed by a secretary or assistant secretary of the said board, by means of any such motive, drawing, or propelling power as aforesaid;" with a proviso that the use of any power other than animal power should be subject to the regulations in Sched. A to the order (that schedule dealing with the break-power and fittings of engines, safety of carriages, inspection of engines and carriages, and speed), "and to any regulations which may be added thereto or substituted therefor respectively by any order which the Board of Trade may and which they are hereby empowered to make from time to time as and when they may think fit for securing to the public all reasonable protection against danger in the exercise of the powers by this order conferred with respect to the use on the tramways of any such power as aforesaid other than animal power."

Sect. 51 enacted that, in the event of any tramways of the promoters being worked by electricity, "it shall not be lawful for the promoters to lay down any line or rail, or to do any act or work for working such tramways by electricity, whereby any telegraphic line of the Postmaster-General is or may be injuriously affected;" the section going on to provide for notice being given to the Postmaster-General of any work to be done within ten yards of any telegraph line. And the section contained

KEKEWICH, J.
1893
NATIONAL TELEPHONE COMPANY v. BAKER.

the following sub-section: "(5.) For the purposes of this section a telegraphic line of the Postmaster-General shall be deemed to be injuriously affected by an act or work if telegraphic communication by means of such line is, whether through induction or otherwise, in any manner affected by such act or work or by any use made of such work."

By the *Telegraph Act*, 1878, s. 2, the expression "telegraphic line" includes anything whatsoever used for maintaining telegraphic communication.

Under their provisional order the corporation constructed a line of tramway from *Roundhay Park* into *Leeds*, consisting of two miles of double line along the *Roundhay Road*, and a mile and a half of single line along the *Harehills Road* and *Beckett Street* within the borough. This line of tramway was opened for traffic on the 29th of October, 1891. It was worked by the Defendant, *William Sebastian Graff Baker*, a contractor or engineer employed by the *Thomson-Houston International Electric Company*, under an agreement between himself and the corporation dated the 6th of May, 1891, by the terms of which he undertook, for a limited period and paying a certain rental, to provide the cars, rolling-stock, and plant necessary for working the tramways on the system of electrical traction adopted by the *Thomson-Houston International Electric Company*, the Defendant being responsible for all damage arising out of accidents or injuries in consequence of the working of the tramway, and the corporation undertaking to keep the tramway itself in repair. The written consent of the Board of Trade to the use of electrical power on the tramway for seven years was given on the 15th of December, 1891; but this consent did not specify the particular method to be used. The *Thomson-Houston* system of electrical motive power adopted by the Defendant was what was commonly known as the "single-trolley system," which consisted of a single overhead conducting wire connected with the tramcar by a trolley and line carrying the electric current to the car, which current operated a motor or motors on the car causing it to travel, the current returning by the rails and by an uninsulated copper conductor running under the roadway parallel to the rails and connected with each rail.

The Plaintiffs complained that the effect of the working of the tramway was to cause such an electrical disturbance to the Plaintiff company's telephone lines as to render them practically useless; and they accordingly issued the writ in this action for an injunction to restrain the Defendant from using the said tramway, or any other tramways in the borough of *Leeds*, in such a manner as to occasion a nuisance to the Plaintiffs as owners or users of telephone lines and electric circuits within the borough, or as the owners or users of the telephone exchange system established in the borough, or in such a manner as to injure, disturb, or interfere with the property or business of the Plaintiffs.

In their statement of claim the Plaintiffs alleged that the effect of the working of the tramway was to interfere with and disturb the Plaintiffs' electric circuits in its neighbourhood, and the currents in such circuits, and to render the wires owned or used by the Plaintiffs in the neighbourhood of the tramway useless for telephonic communication, and so constituted an intolerable nuisance to the Plaintiffs and to the subscribers of the Plaintiff company; and that unless such nuisance was forthwith abated the business of the company in *Leeds* would be seriously damaged, and the use and enjoyment of the Plaintiff *Lupton* of the wire rented by him entirely destroyed; that the electrical disturbance caused by the Defendant's system could be readily prevented by the adoption by him of a different method of completing the electric circuit from his cars to the generating station in *Harehills Road*. The Plaintiffs further alleged that the Defendant was intending to extend the tramway through *Leeds*, and that if such intention were carried out, the Plaintiff company's exchange system in the borough would be destroyed.

In his statement of defence the Defendant alleged that the tramway had been constructed under the statutory authority above mentioned; he also pleaded the agreement and the consent of the Board of Trade, under which agreement and consent he was working the tramway, and denied the alleged electrical disturbance; and he contended that, even if there was such a disturbance, it did not infringe any right of the Plaintiffs, and could not be prevented by the adoption of a different method

KEKEWICH, J.
1893
NATIONAL TELEPHONE COMPANY v. BAKER.

of completing the electric circuit from the cars to the generating station; that the Plaintiffs could easily obviate such alleged electrical disturbance by the adoption of some other method of completing their electric circuit than by the earth return adopted by them. The Defendant also denied the alleged nuisance.

In their reply, the Plaintiffs denied that the agreement of the 6th of May, 1891, authorized the Defendant to work the tramways in the manner in which they were being worked; or that such working was authorized by any provisional order or consent of the Board of Trade.

After the action had been set down for trial, his Lordship, with the consent of both parties, directed Mr. *Macrory*, Q.C., to proceed to *Leeds* to ascertain by inquiry and experiment, in the presence of representatives on each side, and to report to the Court, how far, if at all, the Plaintiffs' telephonic system had been interfered with by the Defendant's tramways, with liberty to employ an assistant.

Mr. *Macrory* accordingly visited *Leeds* in company with Mr. *Henry H. Cunynghame*, barrister-at-law, as his assistant, and conducted a series of experiments there in the presence of representatives from both sides; and he ultimately presented a written report, dated the 11th of January, 1893, which, after detailing the experiments by means of which, he said, he had been enabled to form a decided and accurate judgment on the question, concluded thus: "I report as follows. That the Plaintiffs' telephone system is seriously interfered with by the works of the Defendant. In some cases the disturbance is so great as to render speech quite inaudible. By 'inaudible' I mean that, though the sound of the speaker's voice may be heard, the words being transmitted are entirely unintelligible. In other cases speech was to some extent audible, but an effort on the part of the listener was required to distinguish the words being transmitted; and there cannot be a doubt but that the effect produced by the working of the Defendant's tramcars and line is such as greatly to interfere with the efficiency of the telephone by creating noise which in all cases impairs, and in some cases entirely destroys, the power of transmitting speech." The disturbances were stated to consist sometimes of a buzzing or

whirring noise; sometimes the noise assumed a uniform character like the rushing of water from a tap; while at other times it was similar to a musical note rising or falling, or to the sighing of the wind through trees.

The action now came on for trial.

Several English and American electricians of eminence were called as witnesses on both sides. The merits of the various systems of supplying electrical power for tramway purposes were fully discussed by different witnesses, the weight of evidence being, as his Lordship held, in favour of the Defendant's system, which had stood the test of considerable experience in the United States of *America*. Upon the question of the use by the Plaintiffs of the ordinary "earth return" for their telephonic system, it clearly appeared from the evidence on both sides that the use of a "metallic return," that is, of a second wire, unconnected with earth, to carry the current back, would afford a complete cure for the disturbance complained of, though it was proved that nearly the whole of the Plaintiff company's telephone business throughout the country was carried on by means of the single-wire system.

Sir *R. Webster*, Q.C., *Moulton*, Q.C., *Warmington*, Q.C., *Micklem*, and *R. W. Wallace*, for the Plaintiffs:—

The Defendant pleads that he and the corporation are acting under statutory authority in working the tramway in the manner we complain of; but the statutory power extends merely to the making of the tramway. The consent of the Board of Trade is required only for the purpose of providing for the safety of the public; the board cannot confer a statutory right to interfere with our telephones, neither as a matter of law does the statute authorize the use of electrical motive power in any defined manner. The principle established by the authorities is this, that no statutory authority to do certain acts will justify an interference with private rights, unless the interference is a necessary consequence of that statutory authority, through the impossibility of exercising the statutory powers without causing the interference; and that, if by a reasonable exercise of the statutory powers damage can be prevented, the omission to

KEKEWICH, J.
1893
NATIONAL TELEPHONE COMPANY v. BAKER.

make a reasonable exercise of such powers is "negligence": *Vaughan* v. *Taff Vale Railway Company* (1); *Gas Light and Coke Company* v. *Vestry of St. Mary Abbott's, Kensington* (2); *Metropolitan Asylum District* v. *Hill* (3); *Evans* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (4); *Geddis* v. *Proprietors of the Bann Reservoir* (5); *Rex* v. *Pease* (6); *London, Brighton, and South Coast Railway Company* v. *Truman* (7); *Mersey Docks and Harbour Board* v. *Gibbs* (8); *Harrison* v. *Southwark and Vauxhall Water Company* (9). Further, we rely on the well-established principles that a man cannot bring or collect upon his own land that which will do mischief if it escapes, and that no one has a right to use his own land in such a way as to be a nuisance to his neighbour: *Fletcher* v. *Rylands* (10); *Ballard* v. *Tomlinson* (11). The principle of *Fletcher* v. *Rylands* seems not to have been altogether accepted in *America*: *Pollock* on Torts (12); but at all events it is well-established in this country. Our right to be protected against the nuisance caused by the Defendant's mode of working the tramway is a common law right which the Court will protect by injunction.

Sir *J. Rigby*, S.G., *Bousfield*, Q.C., and *Dunham*, for the Defendant:—

We submit that the Plaintiffs cannot establish a case of what is, at common law, a "nuisance." A nuisance is an interference with an easement, or with the enjoyment of a corporeal hereditament. The definition is given in *Yool* on Waste (13), thus: "Injuries to easements, and such injuries to natural rights of property as do not directly interfere with the possession of the soil, are nuisances." Now, in the present case there is no ground for saying that the Plaintiffs have, in carrying on their business for the last twelve years, acquired an easement or right by prescription. They have no prescriptive or other

(1) 5 H. & N. 679.
(2) 15 Q. B. D. 1, 5.
(3) 6 App. Cas. 193.
(4) 36 Ch. D. 626, 633.
(5) 3 App. Cas. 430, 455.
(6) 4 B. & Ad. 30.
(7) 11 App. Cas. 45.
(8) Law Rep. 1 H. L. 93.
(9) [1891] 2 Ch. 409.
(10) Law Rep. 1 Ex. 265; 3 H. L. 330.
(11) 29 Ch. D. 115, 121, 126.
(12) 2nd Ed. pp. 425–6.
(13) Page 83.

right to use their property as a telephone exchange. Even a twenty years' user would give them no property in such an easement as they are virtually claiming. An easement or right to the uninterrupted use of an electric current passing through the earth cannot be established, any more than in the case of a current of air, or of underground water, or of water flowing in an undefined channel. No exclusive right of property can be claimed in electrical forces or phenomena, the use or enjoyment of which is common to all. There is no law saying that the use of a delicate scientific instrument, such as the telephone, upon one man's land, can in any way interfere with the *primâ facie* and lawful rights of his neighbour on his own land. In working our tramway we are not doing anything on, so to speak, the Plaintiffs' land which is in any way perceptible to the senses, or which can in fact be ascertained or known except by means of scientific instruments of great delicacy. The effect of our working is so impalpable that no one is conscious of it until he proceeds to use these delicate instruments. The Plaintiffs are in a totally different position from that of a plaintiff who has the fee simple of all the land between the exchange and a subscriber's house. In carrying their wires over the properties of other people, they do not acquire any right as against any one; to complete their electric circuit they use any property that comes in their way, but it is open to any one over whose land their wires pass to interrupt them, and not allow them to remain. They exercise their so-called right simply because no one objects, and there is no harm done; but that cannot be the basis of an action of nuisance. This is the first instance, at all events in this country, in which a telephone company has set up such a common law right as is now claimed. Cases such as *Reinhardt* v. *Mentasti* (1), where it was held that, although the defendant was, in doing the act complained of by the plaintiff, acting reasonably in the use of his house, yet the plaintiff was entitled to protection, only apply to the ordinary user of property. To establish nuisance, you must shew an interference with the ordinary enjoyment of life or the ordinary use of property: *per* Lord Justice *Cotton* in *Robinson* v.

(1) 42 Ch. D. 685.

KEKEWICH, J.
1893
NATIONAL TELEPHONE COMPANY v. BAKER.

Kilvert (1). "A man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbour doing something lawful on his property, if it is something which would not injure anything but an exceptionally delicate trade": *per* Lord Justice *Lopes* (2). In that case it was held that, as the defendants were not doing anything which would injure an ordinary trade, they were not liable on the ground of nuisance. Here the Plaintiffs are not carrying on an "ordinary trade," and we are certainly not doing anything which can interfere with an ordinary trade. *Cooke* v. *Forbes* (3) was a case of a noxious trade, and is dealt with by the Court of Appeal in *Robinson* v. *Kilvert*. Upon the question of nuisance, therefore, we submit that the Plaintiffs have no ground for maintaining this action.

But there is another and, as we say, a fatal objection to the Plaintiffs' case. The Defendant is not in the position of an ordinary owner of property; he is acting under compulsory powers conferred by Parliament to use, through the corporation of *Leeds*, these streets for the purpose of tramcars, and to use electrical power. We rely on the statutory authority of the provisional order, especially on sect. 16, and also on sect. 51, which, in providing expressly for the protection of the wires of the Postmaster-General, indicates that we have power to interfere with other wires; and we submit that, so long as we are not using our statutory powers unreasonably or negligently, we are not responsible for the consequences of our exercise of them. Upon the question of the exercise of statutory powers of working an electric tramway, there has been no case yet reported in this country; but there are reported American cases, in which it has been decided that a telephone company has no vested interest in or exclusive right to the use of the "ground circuit" or "earth return" as against an electric street railway company incorporated by statute: *Cincinnati Inclined Plane Railway Company* v. *City and Suburban Telegraph Association* (4); *Hudson River Telephone Company* v. *Watervliet Turnpike and Railroad Company* (5); *Cumberland Telephone and Telegraph Company* v. *United*

(1) 41 Ch. D. 88, 94.
(2) Ibid. 97.
(3) Law Rep. 5 Eq. 166.
(4) 48 Ohio State Rep. 390.
(5) 121 N. Y. 397.

Electric Railway (1), where it was also held that, in the present state of electrical science, a telephone company could not maintain an action against an electric railway company for injury sustained by the escape of electricity from the rails; and that where a person was making lawful use of his own property, or of a public franchise, in such a way as to injure another, the question of his liability depended upon the fact whether he had made use of the best means then known to science. In every case of alleged nuisance the surrounding circumstances and the considerations of time and place are all-important: *Garrett* on Nuisance (2), citing *Clarke* v. *Clark* (3): *Sturges* v. *Bridgman* (4). As to the effect of statutory powers in such cases as this, the law is summed up in *London, Brighton and South Coast Railway Company* v. *Truman* (5). *Gas Light and Coke Company* v. *Vestry of St. Mary Abbott's, Kensington* (6), does not apply, since there was no statutory authority to use the steam-roller there complained of. So in *Metropolitan Asylum District* v. *Hill* (7) there was no express statutory authority, but only a power to build and maintain a hospital, provided it could be done without creating a nuisance. The distinction between a mere power of that kind and an express statutory authority, as in the case of a railway company, is pointed out by Lord *Halsbury* in *London, Brighton and South Coast Railway Company* v. *Truman* (8). *Vaughan* v. *Taff Vale Railway Company* (9) comes really very close to the present case, because there, as here, the use of a dangerous apparatus was authorized or contemplated by statute. Here, by sect. 16 of the provisional order, the possible danger arising from the use of electric power is expressly recognised, and provisions are inserted for the protection of the public against it.

[KEKEWICH, J.:—I had to consider this point, as to the effect of the statutory powers of a tramway, in the recent case of *Rapier* v. *London Tramways Company* (10); and also, as to the effect of the statutory powers of an electric railway company, in the

(1) 42 Federal Reporter, 273.
(2) Pages 5, 6.
(3) Law Rep. 1 Ch. 16.
(4) 11 Ch. D. 852.
(5) 11 App. Cas. 45.
(6) 15 Q. B. D. 1.
(7) 6 App. Cas. 193.
(8) 11 App. Cas. 53.
(9) 5 H. & N. 679.
(10) W. N. (1892) 165.

KEKEWICH, J.
1893
NATIONAL TELEPHONE COMPANY v. BAKER.

Stockwell Orphanage case, *Allison* v. *City and South London Railway Company* (1), where I held that the company were, by reason of their statutory powers, absolved from any liability for nuisance for injury by vibration to the plaintiff's premises, but that such absolution did not operate until they had done their very best to abate the nuisance.]

In that case your Lordship practically followed the decision in *London, Brighton and South Coast Railway Company* v. *Truman* (2), upon which we rely. Then the only remaining question is whether we have been guilty of negligence in the use of our statutory powers. Upon that the evidence shews that our system of electrical traction is the best and most approved system at present known to science, though the experience of it has hitherto been confined mainly to *America*. The disturbances caused by our tramway are, at the present day, necessarily incidental to every large town, and they are disturbances which the Plaintiffs themselves can and should, from the very nature of their business, protect themselves against.

If it should be held that we have in fact infringed any legal right of the Plaintiffs, the case is rather one for damages than injunction: *Holland* v. *Worley* (3).

[KEKEWICH, J.:—That case has not commanded the approbation of the profession.]

At all events, *Lord Cairns' Act* (21 & 22 Vict. c. 27) was passed for the purpose of enabling the Court to grant damages in lieu of an injunction.

Sir *R. Webster*, in reply:—

There is no analogy between this case and a case of underground water, such as *Chasemore* v. *Richards* (4). This is not a case of both Plaintiffs and Defendant drawing a natural supply from the reservoir of the earth. Each party is bringing about a non-natural state of things upon their or his own property—that is to say, for their own purposes they are lawfully producing, by the necessary machinery, currents of electricity, the Plaintiffs

(1) *Times*, February 24, 1892.
(2) 11 App. Cas. 45.
(3) 26 Ch. D. 578.
(4) 7 H. L. C. 349.

producing small currents which do harm to nobody, and the Defendant producing violent currents. I submit that the Defendant, in allowing these violent currents of electricity, produced by himself, to escape from his own property, and cause damage to his neighbours or their trades, renders himself liable to an action, just as much as if the disturbance had been caused by the vibration of the steam-engine driving the dynamos by which the currents are generated. A person who lawfully, for his own purpose, creates a non-natural state of things which may cause injury to his neighbours, does so at his peril. I say that our right of speech through these telephones is a property which gives us a right of action, and that we are entitled to protection under the doctrine, "*Sic utere tuo ut alienum non lædas*," which is the foundation of *Fletcher* v. *Rylands* (1) and that class of cases. But the Plaintiffs have more than a mere right; they have property to which that right is attached, for they possess buildings and plant for carrying on their business. Upon the question of novelty of trade, there is no law that a man may interfere with his neighbour's trade because it is a new one, or that one particular trade, still newer (as the traction of tramcars by electricity is), should be allowed to interfere with the earlier trade because that earlier trade is of a delicate nature. Upon the question of statutory authority, sect. 16 of the provisional order is permissive, not compulsory; it merely says that electrical power "may" be used as an alternative mode of traction. That distinguishes the case from *London, Brighton and South Coast Railway Company* v. *Truman* (2), where the purpose there in question was expressly authorized by statute as incidental and necessary to the use of the railway. The object of the section was to protect the promoters from being liable for consequences such as those in *Metropolitan Asylum District* v. *Hill* (3), *Fletcher* v. *Rylands*, and similar cases. *Holland* v. *Worley* (4), as your Lordship has pointed out, has never been followed. As to *Cumberland Telephone and Telegraph Company* v. *United Electric Railway* (5), that was decided only on the same principles as

(1) Law Rep. 3 H. L. 330.
(2) 11 App. Cas. 45.
(3) 6 App. Cas. 193.
(4) 26 Ch. D. 578.
(5) 42 Federal Reporter, 273.

KEKEWICH, J.
1893
NATIONAL TELEPHONE COMPANY v. BAKER.

were applied in *Vaughan* v. *Taff Vale Railway Company* (1) and *Rex* v. *Pease* (2); and, moreover, there the Court declined to adopt the principles of *Fletcher* v. *Rylands* (3), which, however, is the law here. *Hudson River Telephone Company* v. *Watervliet Turnpike and Railroad Company* (4), when examined, is really in our favour.

[*Dunham*:—In that case, there was a subsequent decision of the Court of Appeal, dated the 11th of October, 1892, in favour of the tramway company.]

Turning to the English cases, the law laid down by the Court of Exchequer in *Fletcher* v. *Rylands* (5) and recognised by the House of Lords (6) is as follows: "We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. . . . And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stenches"—to which, for the same reason, may be added, at the present day, "or electricity." The principle is further recognised in *Hurdman* v. *North Eastern Railway Company* (7), *Crump* v. *Lambert* (8), and *Fleming* v. *Hislop* (9).

The proposition that we must alter our system in order that the Defendant may let loose his electricity with impunity cannot be seriously maintained. We ask your Lordship to lay down no harder rule than that the Defendant is not so to conduct his business as to interfere with the business of the Plaintiff company lawfully carried on.

1893. Feb. 4. KEKEWICH, J.:—

As between the *National Telephone Company*, whom I shall treat as the sole Plaintiffs, although another is associated with

(1) 5 H. & N. 679.
(2) 4 B. & Ad. 30.
(3) Law Rep. 3 H. L. 330.
(4) 121 N. Y. 397.
(5) Law Rep. 1 Ex. 265, 279.
(6) Ibid. 3 H. L. 330, 339.
(7) 3 C. P. D. 168.
(8) Law Rep. 3 Eq. 409, 412.
(9) 11 App. Cas. 686, 690–1.

them, and the *Leeds* Corporation, whom I shall treat as the real Defendants, although not appearing on the record, there is no question of title, and no question but that each is lawfully exercising undoubted rights; nor is there any question but that the acts of the Defendants interfere with the exercise by the Plaintiffs of their lawful rights. This would, I think, have been undoubtedly true if the case had been threshed out on evidence without the advantage of Mr. *Macrory's* report; but that report renders it unnecessary to deal with the evidence on this point; and the interference is of a serious character, so that, if actionable, the remedy would properly be by injunction rather than by damages. The real and only question in the case is whether the interference is actionable. It was practically admitted by the Plaintiffs, and my own view certainly is, that if they can maintain the action against the Defendants at all, it must be on the application of the principle now well known as that of *Fletcher* v. *Rylands* (1). That principle, for the purpose of application to the case in hand, may conveniently be stated by reference to the second of four propositions set out in the 5th chapter of Mr. *Garrett's* book on the Law of Nuisance, which I have consulted in connection with more than one point in this case, and gladly take this opportunity of mentioning as a work of uncommon merit. I will read the proposition in the author's own words, but think it capable of improvement by the substitution for "non-natural" of "extraordinary," which is the term employed by Lord *Kingsdown* in defining somewhat analogous water rights in his well-known judgment in *Miner* v. *Gilmour* (2). The proposition is thus stated by Mr. *Garrett* (3): "If the owner of land uses it for any purpose which from its character may be called non-natural user, such as for example the introduction on to the land of something which in the natural condition of the land is not upon it, he does so at his peril, and is liable if sensible damage results to his neighbour's land, or if the latter's legitimate enjoyment of his land is thereby materially curtailed."

The land into which the Plaintiffs and Defendants alike

(1) Law Rep. 1 Ex. 265; 3 H. L. 330. (2) 12 Moo. P. C. 131.
(3) Page 117.

KEKEWICH, J.

1893

NATIONAL TELEPHONE COMPANY v. BAKER.

discharge their electric current does not belong to either of them; but, for the reasons above indicated, there cannot, as between them, be any question that the principle ought to be applied, if it be applicable at all, on the basis of their being absolute owners. That principle has never yet been applied in English law to such a matter as is now under consideration; and perhaps it would not be too much to say that those who enunciated the law in *Fletcher* v. *Rylands* (1), and have commented on and followed it in other cases, never had present to their minds the application of the doctrine to an electric current and the possible consequences of its discharge into the earth.

The question has been carefully considered in *America*, and I have studied with deep interest the case of *Cumberland Telephone and Telegraph Company* v. *United Electric Railway* (2). The judgment of the Court in that case, though in no wise binding on me, has commanded my earnest attention and respect, and, but for one circumstance, I should not hesitate to allow my own conclusion to be guided by the powerful arguments there set forth. That one circumstance is the want of full adoption of the principle of *Fletcher* v. *Rylands*. American law apparently holds the owner of land used for a non-natural or extraordinary purpose responsible for the consequences of such user to his neighbour only when they result from that owner's negligence; and if he can satisfy the Court that he has not been guilty of negligence, the resulting damage to his neighbour is not actionable. It seems to me that if the principle of *Fletcher* v. *Rylands* had been fully adopted in *America*, the conclusion of the Court in the case just cited must have been different. I believe that in *Scotland*, too, the principle of *Fletcher* v. *Rylands* has not been accepted, and is not regarded as consistent with justice between man and man. It does not fall to me to consider so large a proposition. The principle is thoroughly well settled here, and my duty is merely to consider whether it is applicable. It would be easy, of course, to point out differences between all the cases to which it has hitherto been applied and the present; and I have already said that injury arising from such a case as the discharge of electric current can scarcely have been

(1) Law Rep. 3 H. L. 330. (2) 42 Federal Reporter, 273.

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contemplated by any Judge in previous cases. But after reflecting much on the novelty of the case, on the argument addressed to me, and on the peculiarity of an electric current as distinguished from every other power, I fail to see any reason why the principle should not be applied to it. I cannot see my way to hold that a man who has created, or, if that be inaccurate, called into special existence, an electric current for his own purposes, and who discharges it into the earth beyond his control, is not as responsible for damage which that current does to his neighbour, as he would have been if, instead, he had discharged a stream of water. The electric current may be more erratic than water, and it may be more difficult to calculate or to control its direction or force; but when once it is established that the particular current is the creation of or owes its special existence to the defendant, and is discharged by him, I hold that if it finds its way on to a neighbour's land, and there damages the neighbour, the latter has a cause of action. At any rate, I think that if a distinction is to be taken between this and other forces for this purpose, that distinction must be made by a higher tribunal, and not by a Judge of first instance. It was endeavoured to be argued on behalf of the Defendants, that the current injuring the Plaintiffs was only part of the general body of electricity which may be now said to exist everywhere and to be proceeding in every direction; but the effect of the Defendants' operation is to collect a particular portion of this body and to discharge it into the earth at a particular spot, and there can be no doubt that the disturbance of the Plaintiffs' telephone system is caused by the particular quantity thus discharged.

Assuming the action to be maintainable on the principle of *Fletcher* v. *Rylands* (1), the Defendants rely on two answers to the Plaintiffs' claim. First, they say that the Plaintiffs might by an alteration of their system, that is by the adoption of what is known as the metallic return, prevent the disturbance complained of; and, secondly, they say that they the Defendants are acting under statutory powers, and that if in the proper exercise of those powers they injure the Plaintiffs they are free from blame. The first answer is, to my mind, without

(1) Law Rep. 3 H. L. 330.

KEKEWICH, J.
1893
NATIONAL TELEPHONE COMPANY v. BAKER.

foundation. The man who complains of his land being thrown out of cultivation by the incursion of water escaping from his neighbour's reservoir, must not be told that he has no right of action because if he had interposed a wall, or otherwise taken care to protect himself, the water would not have reached his land. He is using his land in a natural way, and is not bound to take extraordinary precautions, and is entitled to rely on his neighbour also using his land in a natural way, or, if he uses it otherwise, taking extraordinary precautions to prevent damage to others therefrom. There is, no doubt, a body of evidence to shew that a system different from that adopted by the Plaintiffs has been adopted elsewhere with advantage, and may, possibly, prove to be the most convenient though more expensive for them; but the evidence also proves that their present system has been largely adopted and is received with favour by many competent to form an opinion. It also has the merits of economy. They are carrying on their own business lawfully and in the mode which they deem best, and I cannot oblige them to change their system, because they might thereby, possibly, enable the Defendants to conduct their business without the mischievous consequences now ensuing. True it is, that the analogy introduced above fails to this extent, that the Plaintiffs are using the land for an extraordinary purpose; but, admittedly, it is a lawful purpose, and, though under an obligation to obviate mischief from their own operations to their neighbours, they are under none, in my judgment, to protect themselves from the Defendants or others. The outflow from one reservoir might easily destroy another; but, so far as I am aware, there is no principle or authority in English law for rejecting a claim for damage by the owner of the latter on the ground that his user, as well as that of the neighbouring owner, is extraordinary.

The second answer of the Defendants to the Plaintiffs' claim has required more examination. Having recently had occasion in *Allison* v. *City and South London Railway Company* (1), and again in *Rapier* v. *London Tramways Company* (2), to consider such a plea as is here put forward, and to consider many authorities, and in particular the cases of *Metropolitan Asylum District* v.

(1) *Times*, Feb. 24, 1892. (2) W. N. (1892) 165.

Hill (1), and *London, Brighton and South Coast Railway Company* v. *Truman* (2), and their application to different provisions and circumstances, I do not find it necessary again to state my view of the law or of the lines by which I ought to be guided in applying it to a particular case. Therefore, I shall but briefly explain the reasons for my conclusion that the Defendants' plea is good in law, and that they are not responsible to the Plaintiffs for the mischief caused by their works. The Defendants' authority is derived under a provisional order confirmed by Act of Parliament. Such provisional orders in connection with tramways and many other undertakings of a public character are now common, and, I think, must be treated as "a well-known and recognised class of legislation" equally as much as the *Railway Acts*, which were referred to in those terms by the Lord Chancellor in *London, Brighton and South Coast Railway Company* v. *Truman* (3). The *Railway Acts* (again using the language of the Lord Chancellor in the same case) were assumed to establish the proposition that the railway might be made and used whether a nuisance were created or not; and, in my judgment, a like proposition must be assumed to be established by the provisional orders, one of which is here under consideration.

The Defendants are expressly authorized to use electrical power, and the Legislature must be taken to have contemplated it, and to have condoned by anticipation any mischief arising from the reasonable use of such power. A distinction was endeavoured to be made between cases where extraordinary powers are directly sanctioned by the Legislature, and those where it is left to some other authority (in this instance the Board of Trade) to determine whether, if at all, they may be brought into operation. It is within the competence of the Legislature to delegate its authority; and, when once that delegated authority has been properly exercised by the agent to whom it is entrusted, the sanction is that of the Legislature itself, just as much as if it had been expressed in the first instance in an Act of Parliament. The Defendants relied on the 51st section of the provisional order. They argue that the exception there made in favour of the

(1) 6 App. Cas. 193. (2) 11 App. Cas. 45.
(3) 11 App. Cas. 53.

KEKEWICH, J.
1893
NATIONAL TELEPHONE COMPANY v. BAKER.

telegraphic—which would include telephonic—lines of the Postmaster-General, indicates that interference with any other like lines was intended to be permitted. The reference supports the more general argument, and I have, therefore, mentioned it; but I rest my decision more on the established principle laid down in many of the cases, and ultimately ratified by the House of Lords in *London, Brighton and South Coast Railway Company* v. *Truman* (1).

To this plea of statutory power the Plaintiffs have a rejoinder. They say that such power cannot avail the Defendants unless they have acted reasonably in the exercise thereof, and have done their best to avoid injury to their neighbours. The argument being sound in law, one is compelled to examine the facts. The Defendants work their tramways on what is called the "single-trolley system." There are other systems which have from time to time been used, and it seems are still in use elsewhere, and there are at least some good reasons for the conclusion that by the adoption of one or other of these systems the Defendants might wholly or partially avoid the mischief which they now occasion. There is a contest on the evidence whether any of these other systems can be regarded as good apart from comparison with that of the Defendants, and there is a further conflict of evidence whether, if good, they are comparable in merit with that of the Defendants. My conclusion from the evidence is that the Defendants' system is, on the whole, the best which practical science has yet discovered; but there is no occasion really to go as far as this. It is enough to say, and about this I entertain no doubt, that it is at least as good as any other, and has been proved by experience, especially in the *United States*, where there have been larger opportunities for experiment and consideration, to be as likely as any other to meet the requirements of traffic and the convenience of all concerned in the protection of the site of tramways for the use of legitimate purposes other than those of the tramway undertaking. It cannot be that, in the application of the law which I am now considering, the Court is bound to hold a railway or other company liable for the consequences of acts done under statutory powers, because it

(1) 11 App. Cas. 45.

has not adopted the last inventions of ever-changing, ever-advancing scientific discovery. It is surely impossible, with any regard to that common sense which after all is the foundation of this and many other branches of law, to say that a railway which was not liable last year, last month, or even yesterday, because until then its undertaking was carried on according to rules acknowledged to be the best, is liable now—not because those rules have been proved to be altogether wrong in practice, or unscientific in principle, but because some diligent worker in this department has discovered what is held for the moment to be a large improvement but may to-morrow turn out to be only a step in the progress of further advance; and yet this might be the necessary conclusion in many cases, and indeed might be the necessary conclusion here if I were driven to support the Plaintiffs' claim on the ground that the single-trolley system, so largely approved where it has been largely tried, does not avail the Defendants as a proper exercise of their statutory powers, because another system is in use and apparently successfully used at *Buda Pesth* or elsewhere. I do not wish to prejudice the question whether a charge of negligence in the exercise of statutory powers can be supported by cogent evidence that the company exercising those powers has failed to adopt alterations or precautions which sufficient experience has shewn to be of large, indisputable, and permanent value. That question may easily arise in many of the disputes which are likely enough from time to time to occur between public companies and those whom their operations injuriously affect, and it may even arise between the parties to this litigation. Suffice it to say that it does not arise now.

Holding, on the above grounds, that the Plaintiffs cannot maintain an action either for an injunction or for damages against the Defendants, I must order them to pay the general costs. If ever there has been or can be a case to which the distinction between the two scales of costs is properly applicable, this is the one, and the costs must be taxed on the higher scale. But it remains to make an exception, and that of some extent. I have already stated that the interference with the Plaintiffs by the Defendants is beyond doubt. I do not think

KEKEWICH, J.
1893
NATIONAL TELEPHONE COMPANY v. BAKER.

that this ought to have been litigated. Mr. *Macrory's* report shews that one fair experiment would have proved the facts about which there was really very little doubt independent of his report, and that much time was uselessly spent on evidence. Not only must the Plaintiffs be excused payment of the Defendants' costs of this issue—which must be defined to be the issue whether the Plaintiffs' telephonic system was in fact interfered with by the Defendants' operations—but the costs thus excepted from the general costs of the action must be borne by the Defendants and set off. Those costs will, of course, include those incurred in the experiment conducted at *Leeds* under Mr. *Macrory's* superintendence. I am glad to think that the course pursued with the concurrence of both parties of sending him down to make experiments and report was not only successful in finally settling an issue of fact, but also shortened the trial, and saved the further costs which further dispute on this point would necessarily have involved.

There will be judgment for the Defendants with costs, modified in the manner I have expressed.

Solicitors: *Waterhouse, Winterbotham, Harrison, & Harper; C. Leighton.*

G. I. F. C.

KEKEWICH, J.
1893
Feb. 8, 9.

In re CAMPBELL.
CAMPBELL *v.* CAMPBELL.

[1892 C. 4099.]

Will—Administration—Exoneration—Real Estate Charges Act, 1854 (*Locke King's Act*), 17 & 18 *Vict. c.* 113—"*Contrary Intention*"—*Intention evidenced by Will and subsequent Deeds.*

A testator, by his will, after reciting that it was probable that he might acquire the absolute interest in reversion in a sum of Consols, subject to preceding life estates, under some arrangement by virtue whereof he would obtain a transfer of the Consols to himself, upon his charging his real estate with an annual sum equal to the dividends arising from the Consols, devised his real estate, subject to any charge or charges that he might have made under the arrangement before referred to, for the payment of an annual sum equal to the dividends arising from the Consols, to certain uses, and disposed of his residuary personal estate in

another way. The testator subsequently acquired the reversionary interest, and an arrangement was carried out under which the Consols were transferred to him, and he conveyed to the trustees, by whom the Consols were previously held, his real estate by way of mortgage for securing the re-transfer of the Consols at the end of six months, and payment in the meantime of interest equal to the dividends thereon; and by a contemporaneous deed, reciting that the transfer of the Consols to the testator had been made upon an agreement for the re-transfer thereof "in case such re-transfer should ever be required," the testator and the tenants for life released the trustees, and they and the tenants for life covenanted with the testator that if he punctually paid the interest they would not, during the lives of the tenants for life, require the re-transfer unless required for some purpose connected with the estate, of which the Consols originally formed a part. The testator subsequently made a codicil to his will, but did not therein refer to the above-mentioned transactions. The interest on the mortgage was punctually paid, and re-transfer of the Consols was never required.

On the death of the surviving tenant for life, who survived the testator, the legatees of the residuary personal estate claimed that the amount secured by the mortgage was chargeable on the real estate in their favour:—

Held, that upon the will and subsequent deeds there was sufficient evidence of a "contrary intention," within the meaning of the statute 17 & 18 Vict. c. 113, and that the real estate, in the events which had happened, was exonerated from payment of the mortgage debt.

ADJOURNED SUMMONS.

George H. F. Campbell, by his will dated the 31st of July, 1874, reciting that under or by virtue of the will and codicils of *Algernon Cox*, deceased, the testator's son, *Henry Algernon Campbell*, was entitled to a fund, represented by a sum of £17,337 Consols, in reversion expectant upon the decease of the survivor of *Laura Cox* and *Charles Thomas Cox*, subject to several mortgages or charges for securing the repayment to the testator of sums of money amounting to £7000, or thereabouts, with interest, and that it was probable that he might acquire the absolute interest in the said reversion under some arrangement by virtue whereof he would obtain a transfer to himself of the said sum of £17,337 Consols, upon his contemporaneously with such transfer charging the *Evenley Hall* estate (thereinafter devised in strict settlement) with an annual sum, equal to the dividends arising from the said sum of Consols, in favour of the said *Laura Cox* and *Charles Thomas Cox* and

KEKEWICH, J.
1893
In re CAMPBELL.
CAMPBELL *v.* CAMPBELL.

the survivor of them during their lives and the life of the survivor of them, the testator devised freehold lands, known as the *Evenley Hall* estate (but subject to any charge or charges that he might have made thereon or on any part thereof under the arrangement before referred to for the payment of an annual sum equal to the dividends arising from the said sum of £17,337 Consols), to certain uses under which, subject to a jointure to the testator's wife, his son *Walter S. Campbell* was tenant for life, with remainder to *George Augustus Campbell* for life, with remainders over. The testator then directed that his trustees should hold all his residuary estate after payment thereout of his debts, and funeral and testamentary expenses, and legacies (which he charged thereon), upon trust to set apart or raise a sum of £40,000, to be held on certain trusts, and to hold all his residuary estate, in case he should in his lifetime have acquired the absolute interest in the aforesaid reversion upon trust yearly, during the lives of the said *Laura Cox* and *Charles Thomas Cox* and the survivor, to levy and raise out of the annual produce of his residuary estate by equal half-yearly payments (the first to be made at the expiration of six calendar months after his decease), the clear yearly sum of £250, and to be possessed thereof upon the trusts thereinafter declared concerning the same; and in case he should have acquired the absolute interest in the said reversion as aforesaid, upon trust, immediately after the decease of the survivor of *Laura Cox* and *Charles Thomas Cox*, to set apart or raise out of his residuary estate a sum of £9000 to be possessed thereof upon the trusts thereinafter declared; and in case he should not in his lifetime have acquired the absolute interest in the said reversion, then upon trust immediately, or as soon as might be after his decease, to set apart or raise out of his said residuary estate the sum of £7000, with interest thereon from his decease after the rate of £4 per cent. per annum, and to be possessed thereof upon the trusts thereinafter expressed; and he declared that, subject and without prejudice to the several trusts aforesaid, his trustees should hold all his residuary estate (including, until the decease of the survivor of the said *Laura Cox* and *Charles Thomas Cox*, all the annual produce

thereof which would not be required for payment of the said yearly sum of £250) in trust for *Walter S. Campbell* absolutely; and he declared that his trustees should be possessed of the sum of £9000, or £7000 (as the case might be), which was to be raised out of his residuary estate as aforesaid, upon trust to invest, and during the life of the said *Henry Algernon Campbell*, and (after his decease) during the life of his widow (if any), to pay and apply all or any part of the annual produce (including as annual produce for all the purposes of that trust the aforesaid yearly sum of £250 so long as the same should continue payable) according to their sole discretion as the same should become payable, and without interruption, for or towards the maintenance and personal support of the said *Henry Algernon Campbell.*

The testator subsequently acquired the absolute interest in reversion in the £17,337 Consols, and that sum was transferred to him by the trustees of the will of *Algernon Cox*; and by an indenture of mortgage, dated the 30th of March, 1875, and made between the testator of the one part, and such trustees of the other part, in consideration of the transfer, the testator conveyed to them the *Evenley Hall* estate by way of mortgage for securing the transfer on the 30th of September, then next, of the sum of Consols, and for securing in the meantime payment of sums equal to the dividends thereon.

By indenture of even date with the last-mentioned deed, and made between the trustees of the will of *Algernon Cox*, the two tenants for life of the Consols, and the testator, reciting that it had been agreed between the parties to transfer the sum of £17,337 Consols to the testator on having the re-transfer thereof (in case such re-transfer should ever be required) with interest in the meantime equivalent to the sums of money which would have been receivable as and for the dividends of the said sum of Consols if the same had not been transferred, being secured in manner hereinafter mentioned, the tenants for life and the testator released the trustees and the estate of *Algernon Cox* from the said £17,337 Consols so transferred as aforesaid, and all dividends thereon, and the other parties covenanted with the testator that if he punctually paid the interest in lieu of dividends

KEKEWICH, J.
1893
In re CAMPBELL.
CAMPBELL *v.* CAMPBELL.

under the mortgage, they would not during the lives of the tenants for life require the re-transfer of the Consols, unless the same should be required for some purpose connected with the estate of *Algernon Cox.*

On the 4th of April, 1876, the testator made a codicil to his will, whereby he appointed his son-in-law, the Hon. *Henry Walter Campbell,* to be a trustee and executor of his will jointly with his sons *W. S.* and *G. A. Campbell,* and gave him a legacy, but in other respects confirmed his will.

On the 6th of March, 1882, the testator died; and on the 26th of April, 1882, his will was proved by the said *W. S.* and *G. A. Campbell,* power being reserved to the Hon *H. W. Campbell.*

On the 14th of October, 1886, the testator's widow died.

In 1887 *W. S. Campbell* sold the *Evenley Hall* estate as tenant for life, and out of the proceeds the sum of £17,337 Consols was, on the requisition of the purchaser, replaced in the names of the trustees of the will of *Algernon Cox* and of *C. T. Cox, Laura Cox* being deceased.

On the 12th of July, 1892, *C. T. Cox* died, and the proceeds of the Consols were paid by the surviving trustee of the will of *Algernon Cox* to the executors of the testator.

This was an originating summons by *W. S. Campbell,* as Plaintiff, asking for an order declaring that the sum of £16,771 in the hands of the Plaintiff and of the Defendant *G. A. Campbell,* representing the sum of 17,337 Consols secured by the mortgage of the 30th of March, 1875, formed part of the residuary estate of the testator, and directing transfer and payment thereof to the Plaintiff accordingly, or otherwise declaring the rights and interests of the persons interested in such sum.

Vernon R. Smith, for the Plaintiff:—

I submit that the testator's interest in this sum of £16,771 formed part of his residuary personal estate, and that the mortgage debt, according to the ordinary course of administration, is to be borne by the real estate on which it is charged. There was no merger of the debt, as the life estate of the surviving tenant for life was subsisting at the death of the testator: *Wilkes*

v. *Collin* (1). There is no indication of a contrary intention on the part of the testator within the meaning of the statute 17 & 18 Vict. c. 113. If the arrangement contemplated by him when he made his will had been carried out, the case might have been otherwise; but the arrangement actually made was substantially different from that contemplated, because the whole capital sum, and not merely the interest payable during the lives of the tenants for life, was charged on the real estate. Moreover, after the mortgage, the testator made a codicil to his will by which he might have given, but did not give, any direction as to the incidence of the mortgage debt.

Swinfen Eady, for the Defendants, the devisees:—

I submit that the devised estate is exonerated from payment of the mortgage debt. By 17 & 18 Vict. c. 113, it is provided that the contrary intention therein referred to—that is, the intention to throw the mortgage debt on the residuary personal estate—may be signified not only by the will, but by any "deed or other document." The Court can, therefore, look not merely at the will and codicil, but also at the mortgage and contemporaneous deed of release. On the whole of the documents there is clear evidence of intention that the devisees should take, subject only to the obligation to pay to the two tenants for life the interest due to them. The terms of the gift of the residuary personal estate are sufficient, taken with the preceding devise of the real estate, to establish this; but the words of the deed of release, which are remarkable, place the matter beyond doubt. That deed contains a recital that an agreement had been come to for re-transfer of the Consols in case such a re-transfer should "ever" be required. If it were an ordinary mortgage, which must be paid off, that expression would be devoid of meaning. The arrangement actually carried out was substantially, though not in form, the same as that contemplated by the will. The substance and effect of it was to secure the income to the tenants for life. The question is one of intention, on which decided cases throw but little light.

[KEKEWICH, J.:—Is not the general result of the cases this

(1) Law Rep. 8 Eq. 338.

KEKEWICH, J. 1893 In re CAMPBELL. CAMPBELL v. CAMPBELL.

—that *Locke King's Act* in effect shifts the burden of shewing that the mortgaged estate is exonerated?]

Yes. The burden is, without doubt, on the devisee to shew an intention to exonerate. But the whole scope of the will is to be regarded: see *In re Fleck* (1); and here, upon the face of the will coupled with the deeds, it is clear that the contemplated arrangement was, in substance, carried out, and that therefore the intention of the testator, that the devisees should take subject only to the burden of paying the interest to the tenants for life, must take effect.

[KEKEWICH, J.:—It might be contended that the transaction of March, 1875, was not a mortgage within *Locke King's Act*, but merely a deed of indemnity to the trustees of *Algernon Cox's* will.]

Vernon R. Smith, in reply:—

At the death of the testator the Act of 1877 (40 & 41 Vict. c. 34) had been passed, extending *Locke King's Act* to charges generally. In *In re Fleck* there was a manifest indication of intention that particular debts should be paid out of particular parts of the testator's estate. Here, upon the will, it is clear that the testator did not contemplate that which actually happened. The gift of the residuary personal estate adds nothing as an indication of intention to the preceding devise of the real estate. The question, therefore, must turn upon the subsequent deeds. No sound inference can be drawn from the use of the word "ever" in the deed of release. There was a mortgage subsisting at the death of the testator, and the mere fact that he contemplated that it might not be called in affords no indication of intention on his part as to the incidence of it.

KEKEWICH, J.:—

If it were permissible for me to put aside *Locke King's Act*, to forget the rule of administration independently of that Act and anterior to it, and to decide the question before me merely on the ground of the intention of the testator, as disclosed by the

(1) 37 Ch. D. 677.

evidence furnished by the documents, there ought, to my mind, to be little doubt about the result. The testator had a charge on a large sum of money to which his son was entitled in reversion expectant on the determination of two life estates. He had no charge on, nor any claim to, the preceding life estates. He acquired the reversion—that is to say, he purchased the equity of redemption; the result being that he became entitled to this sum of money, which was in the hands of trustees, subject only to the life estates. If he had chosen to wait until the life estates dropped, he could have called for a transfer to himself, and the trustees would have been bound to respond to his call. But he desired to have the money at once, and was willing to indemnify them; and they, of course, required a substantial indemnity for their own protection and for the protection of their *cestuis que trust*, and so they took a mortgage for the purpose of providing for the interest, and they also, by way of further precaution, which, so far as I am aware, was unnecessary, but I dare say, prudent, provided that the money should be forthcoming if required for any purpose connected with their testator's estate. It was not suggested that the event was likely to happen, or that it has in fact happened. What the testator did really was to indemnify them against the payment of the interest during the life estates and against any loss that might have accrued to them if it were not paid, and to indemnify the tenants for life so that they might receive the interest half-yearly. Subject to this the property was his, and no one could gainsay his title. It could scarcely be pretended that such a transaction as that was effected with the purpose of giving a charge on his real estate. The real estate was unincumbered for the purpose of indemnity beyond the interest payable to the tenants for life—a mere temporary arrangement intended to fall through as the lives dropped. If, therefore, as I have said, I could put aside *Locke King's Act* and the rules of administration, and proceed on the question of intention only, I should have no hesitation in holding that there was no charge really intended to be created which would hold good as an additional estate when the lives dropped. But, of course, I am not entitled to dispose of the case in that simple way.

KEKEWICH, J.
1893
In re CAMPBELL.
CAMPBELL *v.* CAMPBELL.

There was a charge which existed at the death of the testator—a charge coming, therefore, within the rules of administration, and coming also within *Locke King's Act.* The purchaser of the real estate rightly and properly required that it should be discharged before he completed his purchase, and the question now is what is to happen to the money which has been set aside or is available for the payment of this charge. Fortunately, the Act of Parliament, which has given rise to a good deal of litigation and is not always by any means easy of construction, has provided that the Court may regard the intention of the mortgagor, being also testator, if the Court can find it in the documents; and in what I have said I have endeavoured to construe the documents only, and to draw a fair inference from them without regard to extraneous facts; and, therefore, it seems to me that, though I have supposed an impossible hypothesis, yet, when I come to apply *Locke King's Act* to such a mortgage, I really am enabled to see the intention which I should have given effect to if the Act had not been there and there had been no rule of administration.

What I have to find is, in some document executed by the testator or binding on him, an intention that this charge shall not affect the real estate; and that document may be either his will or any other document; and though I am not aware of there having been a decision on the point, I apprehend that a will before the mortgage would be amply sufficient if the intention was clear. Here I have three documents: the will, which was anterior to the mortgage, the mortgage itself, and the contemporaneous deed. The mortgage and the contemporaneous deed are really one instrument; they are only separated for the purpose of conveyancing—a very proper separation, but not one of substance as regards the history of these transactions. By the will the testator contemplated something slightly, but substantially, different from what actually occurred. He contemplated acquiring the absolute interest, and mortgaging the estate to secure, in form as well as in substance, the interest during the lives of the tenants for life; and he therefore refers to the contemplated arrangement, and devises his estate subject to such a mortgage. I cannot go so far as to say that he thereby exhibits

an intention not to charge the estate further or otherwise; but it is useful to this extent, that he did not contemplate a charge greater than that. There is nothing of a negative character, but there is the limitation of the positive charge. You cannot find in the will, if it is necessary to find it there, any intention to charge the estate with any sum. On the contrary, there is a limitation of the intention to charge. I agree with Mr. *Vernon Smith* that there is nothing to be extracted, or I fail to extract anything, out of the gift of the residuary personal estate. I leave the will on the devise of the real estate. Well, after the will, the transaction was carried out in a different form—the form I have before mentioned; and it is remarkable, no doubt, that in the deed of release and covenant in the part of the transaction which was expressed in the separate deed, to which the testator was a party, there is a statement that it has been agreed—he executes the deed, and says it has been agreed at his request—that the sum should be transferred to him on having the re-transfer thereof secured—that is to say, on his securing the re-transfer—in case such re-transfer should "ever be required." He agrees that he will secure the re-transfer if and when it is required, not that he will secure the re-transfer thereof indefinitely, and, in the ordinary way of a mortgage, at the end of six months or so many years, or the death of a certain person, or on any other ascertained or unascertainable event, but in case it is "ever required." The agreement, therefore, between the parties is evidenced by that, so that if it is never required it should not be retransferred. What was the requirement? If he failed for thirty days to pay the interest, or if the administration of *Algernon Cox's* estate rendered it necessary for the trustees of his will to call this money in. Subject to that, the testator contemplated, and it was agreed by him with the other parties, that there never should be any re-transfer at all. Reading the whole transaction together, reading that into the mortgage, which, as I have said, I think I am entitled to do, I find here a tolerably plain indication by him—"signification" is the word of the statute, or, rather, the noun taken from the verb "signify" therein used—of a contrary or other intention—that is to say, an intention other than that the real estate should bear this charge. It seems to me, regarding

KEKEWICH, J. 1893 In re CAMPBELL. CAMPBELL v. CAMPBELL.

the matter in that way, that he has pretty plainly said that the real estate should not bear the charge except in events which have not happened.

The result is, that that which I have endeavoured to explain to be the clear intention apart from the Act or the rule of administration fits in with the words of the Act, and the real estate passes by the devise without this incumbrance; and the practical result of that will, I suppose, be that the money set apart to protect the purchaser must, notwithstanding that, follow the destination of the rest of the purchase-money.

Solicitors: *Bloxam, Ellison & Co.*

C. C. M. D.

KEKEWICH, J. 1893 Feb. 17.

EVANS *v.* DAVIES.

[1893 E. 102.]

Practice—Limited Company—Shares—Pending Action—Perishable Chattels—Preservation of Property—Order for Sale—"Goods"—Rules of Supreme Court, 1883, *Order* L., *r.* 2.

Shares in a limited company are "goods" within Rules of Supreme Court, 1883, Order L., r. 2, and may therefore be sold under that rule, in a pending action, if for "any just and sufficient reason" it may be desirable to have them sold at once.

By an agreement dated the 19th of November, 1891, and made between the Plaintiff of the one part and the Defendant of the other part, the Plaintiff agreed "to sell," and the Defendant "to purchase," 130 six per cent. preference shares of £10 each, fully paid, in the *Carmarthen United Breweries, Limited,* at the price of £1300, the Defendant paying the Plaintiff £300 by way of deposit, and giving the Plaintiff a four months' bill for £500 in further part payment of the purchase-money, and the balance of £500 to be paid on the date of the maturity of the said bill, whereupon the Plaintiff would execute a transfer of the shares to the Defendant. On the completion of the purchase the Plaintiff was to pay or allow to the Defendant the sum of £91 "by way of commission on the said sale and purchase and in reduction of

the said balance of £500. Until completion of the said purchase as aforesaid" the certificate of the shares was to remain in the custody of a Mr. *Rees* "as trustee for" the parties, the interest on the shares being received by the Plaintiff. Until payment of the whole of "the purchase-money" the certificate, shares, and interest were to stand charged with the payment to the Plaintiff of the unpaid "purchase-money." In default of completion the Plaintiff was to be at liberty to sell the shares, and out of the proceeds to retain the unpaid balance of "purchase-money" and pay the balance to the Defendant.

The Defendant paid the Plaintiff the deposit of £300 and gave him a four months' promissory note for £500, but this promissory note was dishonoured at maturity, whereupon the Plaintiff brought an action against the Defendant in the Queen's Bench Division for the amount of the promissory note and interest. The Defendant delivered a statement of defence to that action, the question being whether the transaction between him and the Plaintiff was, as alleged by the latter, one of sale and purchase of the shares, or whether the Defendant was—as he alleged he was—merely the agent of the Plaintiff to sell the shares on commission. Shortly after the close of the pleadings in that action, the Plaintiff discovered that the Defendant was advertising an intended sale of the shares by auction, whereupon he, the Plaintiff, issued a writ in the Chancery Division before Mr. Justice *Kekewich*, claiming a declaration that he was entitled to a lien on the shares for £1000, the balance of purchase-money remaining unpaid, with interest; also to have the shares sold towards payment of the £1000 and interest; judgment for the balance (if any) remaining unsatisfied after such sale; and an injunction. The Plaintiff thereupon served the Defendant with notice of motion in the Chancery action for an *interim* injunction to restrain the Defendant from selling or otherwise dealing with the shares, on the ground that the offering of the shares for sale by auction would depreciate their value, and prejudice his, the Plaintiff's, lien; the Defendant then served the Plaintiff with a cross notice of motion in the same action for an order directing a sale by auction of the shares and payment of the proceeds into Court to the credit of the action, to be dealt with

KEKEWICH, J.
1893
EVANS v. DAVIES.

as the Court should direct, on the ground that the shares had gone up in value and would, if sold, realise more than sufficient to meet any claim the Plaintiff might have under the agreement and so put an end to the Queen's Bench action. Subsequently an order was made by the Queen's Bench Division transferring the Queen's Bench action to Mr. Justice *Kekewich*.

The two Chancery motions now came on for hearing.

The main question was whether the shares came within Rules of Supreme Court, 1883, Order L., the order which relates to the *interim* preservation of property the subject of a pending action, and rule 2 of which is as follows: "It shall be lawful for the Court or a judge, on the application of any party, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as the Court or Judge may think desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once."

D. Villiers Meager, for the Defendant:—

My case is that I am agent for the Plaintiff to find a purchaser of the shares, and I ask for an immediate sale of them. I submit that shares are "goods" within Order L., rule 2. The word "goods" has been held to include bonds: *Coddington* v. *Jacksonville Railway Company* (1). I am entitled to a lien on the shares for the £300 I have paid.

H. Terrell, for the Plaintiff:—

The rule does not give the Court jurisdiction to order a sale in such a case as this. Shares are not "goods, wares, or merchandise." If they are, these shares are not "perishable," nor are they "likely to injure from keeping," for the evidence shews they are increasing in value. Nor is there any reason why it is "desirable to have them sold at once." If the Defendant is my agent, he has no right to deal with these shares or force me to sell them. If he is a purchaser, I am entitled to judgment.

(1) 39 L. T. (N.S.) 12.

KEKEWICH, J.:—

On this agreement of the 19th of November, 1891, there is a question whether the shares mentioned therein were purchased out and out by the Defendant upon the terms set out in that agreement; or whether, in fact, the agreement for sale and purchase was a sham, and whether in reality the Defendant was constituted the agent of the Plaintiff for the sale of the shares, which meant that the Plaintiff might revoke his mandate at any time, and that therefore it was really a revocable agency. The Defendant says he is the agent of the Plaintiff, and that he held the shares only for the Plaintiff's purposes; but the Plaintiff has insisted on payment of the purchase-money and not anything more. He sues in the Queen's Bench action, and says the Defendant is a purchaser and bound to pay. That is a question for the trial, and is one of some difficulty. In the meantime the Plaintiff is entitled to protection against his property being made away with. The Defendant is also entitled to protection. He has paid £300, and he is entitled to a lien on the shares in any event for what he has paid, and he is not bound to wait until the trial to have his lien enforced, if the Court has in the meantime power to do it for him. The question is whether the Court has that power. Under Order L., rule 2, the Court has power to sell, that is, to direct a sale of, "any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once." The great object of that rule is to enable the Court, while an action is pending, to sell the goods or merchandise in dispute, and to keep the proceeds in Court to abide the result of the litigation. Upon that rule I have myself acted constantly, and it is a very useful rule. Now, are shares "goods" which can be sold under that rule? It was held in *Bartholomew* v. *Freeman* (1) that "goods" included a horse; and in *Reg.* v. *Slade* (2) it was held under sect. 40 of another statute, 2 & 3 Vict. c. 71, that the word included a dog. The reasoning of Mr. Justice *Manisty*, which seems to have been taken from an interlocutory observation by Mr. Justice *Hawkins* during the argument in that

(1) 3 C. P. D. 316. (2) 21 Q. B. D. 433.

KEKEWICH, J.
1893
EVANS v. DAVIES.

case, seems applicable to the present case. The observation of Mr. Justice *Hawkins* was this: "Surely under a bequest of 'all my worldly goods,' a dog would pass to the legatee."

An illustration of the same kind, if applied to shares, may be found in a phrase with which most of us are familiar at some time of our lives: "With all my worldly goods I thee endow." Then in a case of *Coddington* v. *Jacksonville Railway Company* (1), it was held by the Court of Appeal that certain foreign bonds came within the rule, and an immediate sale of them was ordered. Accordingly, with these authorities before me, I have no hesitation in holding that the word "goods" does include shares.

Well then, supposing "goods" include shares, can the shares now in question properly be ordered to be sold in this particular case? Are they "of a perishable nature or likely to injure from keeping"? I do not take those words as applicable to shares. Then are they goods "which for any other just and sufficient reason, it may be desirable to have sold at once"? In my opinion they come within those words. In *Bartholomew* v. *Freeman* (2), it seems to have been admitted that a horse was "goods" within the rule, and the Court came to the conclusion that as the horse was consuming its value in food, or, in common parlance, "eating his head off," that was a just and sufficient reason for selling it at once, and accordingly, an order was made to that effect under the rule.

It is common knowledge that shares in a limited company, however flourishing, are of a fluctuating character, and any person holding a number of such shares would sell them as soon as they had attained a good market price. Here the shares have gone up in value, and will, if sold, realize, it appears, sufficient to answer the Plaintiff's claim. Therefore, the Defendant has sufficient reason for saying that the shares should be sold at once, supposing an opportunity arises for selling at once, The Defendant says they ought to be sold under an order of the Court. I think so too. I therefore make an order on both motions, that the shares be sold under the direction of the Court, and then the Court will decide who is entitled to the

(1) 39 L. T. (N.S.) 12. (2) 3 C. P. D. 316.

proceeds of sale. The costs of the motions will be costs in the action.

KEKEWICH, J.
1893
EVANS v. DAVIES.

Solicitors: *Crowders & Vizard; Evans, Richards, & Marriott,* agents for *J. R. Richards, Swansea.*

G. I. F. C.

CATTON *v.* BANKS.

KEKEWICH, J.
1893
Feb. 14, 28.

[1889 C. 4004.]

Practice—Partition Action—Real Estate—Proceeds of Sale—Incumbered Shares —Incumbrancers—Costs, Separate sets of.

Real estate divisible under a settlement in three equal shares, of which two were incumbered and the third unincumbered, was sold in a partition action, and the proceeds were paid into Court:—

Held, on further consideration, that only one set of costs in respect of each share should be allowed out of the fund in Court.

Belcher v. *Williams* (1) not followed.

By the marriage settlement, dated in 1834, of *Richard Catton* and *Elizabeth* his wife, certain real estate was conveyed to trustees, upon trusts for the husband and wife during their respective lives, and, after the death of the survivor, for their children, at twenty-one or marriage, equally.

The husband died in 1842 and the wife in 1873.

There were three children only of the marriage, namely, *Richard Thomas Golty Catton, Eleanor Catton,* and the Plaintiff *Elizabeth Golty Rouse Catton,* all of whom attained twenty-one.

Richard Thomas Golty Catton died in 1863, having by will given all his property to the Defendant *Eliza Baxter.*

Eleanor Catton married *James George Herbert Webb,* and died in 1876 intestate. Her husband died in 1888, having devised all his estate upon trusts for the benefit of his three children, the infant Defendants.

This action was brought by the Plaintiff against the surviving trustee of the settlement, *Eliza Baxter,* her husband and the mortgagees of her share, the infant children of *James George*

(1) 45 Ch. D. 510.

KEKEWICH, J.
1893
CATTON v. BANKS.

Herbert Webb, deceased, and the mortgagee of his deceased wife's share, claiming an account of the rents and profits of the settled property, and, so far as necessary, administration of the trusts of the settlement, partition or sale of the settled property, a receiver, and accounts and inquiries.

On the 1st of July, 1890, judgment was pronounced directing various inquiries and accounts, including an inquiry whether a sale or partition would be most beneficial to the parties, and, if it was certified that a sale would be more beneficial, then it was ordered that the hereditaments should be sold with the approbation of the Judge, and the proceeds brought into Court.

On the 15th of May, 1891, the Chief Clerk certified that the Plaintiff was entitled absolutely to one-third of the property, her share being unincumbered; that *Eliza Baxter's* share was subject to two mortgages executed by herself and her husband in 1875 and 1877; and that the remaining one-third was vested in the trustee of the will of *James George Herbert Webb*, subject to a mortgage executed by his wife, *Eleanor Webb*, and himself in 1875; also that a sale would be more beneficial than a partition.

The property having been sold under various orders of the Court, and the proceeds, about £2900, paid into Court to the credit of the action, the action now came on upon further consideration upon prepared minutes, proposing taxation of the costs of the Plaintiff and Defendants and division of the balance of the funds in thirds. The question arose whether, in taxing the costs of the Plaintiff and Defendants, only one set of costs should be allowed in respect of each of the two incumbered shares, or whether the parties representing each of those two shares should be allowed any additional costs occasioned by the incumbrances. Apart from the costs of the Defendant, the trustee of the settlement, the question therefore was whether there should be only three sets of costs—that is to say, one set each in respect of the Plaintiff's share, the *Baxter* share, and the *Webb* share; or whether there should be six sets—that is to say, one set in respect of the Plaintiff's unincumbered share, three sets in respect of the *Baxter* share (one for the Defendant Mrs. *Baxter*, and one for each of the Defendants, her two mortgagees), and two sets in respect of the *Webb* share (one for the Defendants, the beneficiaries

of that share, and one for the Defendant, the mortgagee of that share).

Upon the action now coming on upon the present hearing, only one set was claimed on behalf of the *Webb* share.

Ingpen, for the Plaintiff:—

The present question arises in consequence of Mr. Justice *North's* decision in *Belcher* v. *Williams* (1), according to which there should be six sets of costs, each mortgagee thus having a separate set; but as costs are in the discretion of the Court, I submit that under the special circumstances of this case it would be unreasonable to burden this fund of £2900 with six sets of costs, and that the proper course is to give only one set of costs in respect of each share.

Leake, for the Defendants, the infant beneficiaries and the mortgagee of the *Webb* share:—

I only claim one set of costs in respect of my share; and I submit that there should be only one set in respect of the *Baxter* share also.

E. S. Ford, for the Defendants, the second mortgagees of the *Baxter* share:—

I ask your Lordship to follow *Belcher* v. *Williams*, and to give me a separate set of costs. I must concede the same to the first mortgagees of this share.

Gatey, for the Defendants, the first mortgagees of the *Baxter* share, also claimed a separate set of costs.

Keary, for the Defendants *Eliza Baxter* and her husband:—

I am, in any event, entitled to my costs, for my share could not be sold without my concurrence as owner of the equity of redemption.

Methold, for the Defendant, the trustee of the settlement.

1893. Feb. 28. KEKEWICH, J.:—

It is not a light thing to contravene the deliberate decision of a brother Judge, especially when that decision is upwards of

(1) 45 Ch. D. 510.

KEKEWICH, J.
1893
CATTON v. BANKS.

two years old, and concerns a point of practice of which it may be difficult to obtain consideration by the Court of Appeal. Wherefore, and notwithstanding that on a previous occasion I carefully studied the case of *Belcher* v. *Williams* (1), and after careful study did not adopt Mr. Justice *North's* judgment therein, I have deemed it right again to consider that judgment, and also to inquire of the officers of the Court to what extent it has been departed from or followed. Strangely enough, the question which I will presently define does not appear to have required frequent consideration. No case of argument and decision, unless a case of *Riddell* v. *Evans* before myself can be so described, has been discovered; and, on the other hand, neither the Registrars nor the Taxing Masters who have been consulted can find me a case in which Mr. Justice *North's* judgment has been followed, though possibly, and indeed probably, orders of that character have been made. The point was raised before Mr. Justice *Chitty* in *Cleverton* v. *Cleverton*, in January, 1891. No decision was pronounced, but the Judge expressed a doubt whether that of Mr. Justice *North* was correct; and an order on different lines was ultimately made by consent. *Riddell* v. *Evans* came before me shortly afterwards, and after some discussion I made an order according to *Cleverton* v. *Cleverton*, but, though not prepared to follow Mr. Justice *North's* judgment, did not deliver any myself. There is no record of either approval or disapproval by Mr. Justice *Stirling*. The point has now been argued before me, and a distinct utterance of opinion is imperative.

The point is this: It is settled practice to allow the costs of what is commonly called a "partition action"—that is, an action in which property is sold for the purpose of distributing the proceeds among two or more parties entitled thereto out of the entire proceeds of sale; and, so long as the costs incurred in respect of each share are roughly of about the same amount, the rule works fairly to all concerned, and each party entitled gets, in the ultimate result, a sum calculated on the basis of his paying the share of the entire costs exactly proportioned to his share in the property sold. The fairness of the rule would be somewhat

(1) 45 Ch. D. 510.

disturbed by the costs incurred in respect of any one share largely exceeding those incurred in respect of the other shares. But it is not usually necessary or right to inquire into such matters, the broad view being that all the costs properly incurred in order to realization and division are incurred on behalf of all the proprietors. If any one proprietor has incumbered his share, and the incumbrancer, who is of course a necessary party, appears separately, he is entitled to his costs out of either the entirety or the particular share affected by his charge; and the question is, which ought to bear those costs. It may affect the incumbrancer; that is, it will do so if the incumbered share is insufficient to pay his principal, interest, and costs; but if that share be sufficient for this purpose, the point is immaterial to him and becomes material to his mortgagor. And that is how it arises in this particular case. The property is divisible into three shares, one being incumbered, one having a single incumbrance on it, and the other two incumbrances. If the incumbrancers' costs are to be paid out of the entire fund, there will be (apart from the costs of the trustee of the settlement) six sets of costs; but on the other footing there will be three only. According to *Belcher* v. *Williams* (1) the first result would prevail; but I am asked by the owner of the unincumbered share, and also by the owner of the share on which there is one incumbrance only, to adopt the second.

Let me in the outset express my entire concurrence with Mr. Justice *North's* opinion that this is a matter of discretion. It is desirable to have guiding rules, and it is desirable that those rules should be followed generally and by all Judges; but it is impossible to say that they shall be without exception, or that any Judge shall not be at liberty, in any particular case, to act according to his discretion under the circumstances before him. That would, I conceive, be directly contrary to the *Judicature Acts* and the practice of the Court.

Also, I completely agree with Mr. Justice *North* in thinking that the point is not settled by the recognised rule in administration actions—that only one set of costs shall be given in respect of each share. The practice in administration actions

(1) 45 Ch. D. 510.

KEKEWICH, J.
1893
CATTON v. BANKS.

affords a useful analogy, which should, I think, be applied, unless there is some cogent reason to the contrary; but I do not think it can be regarded as having established a rule for this class of cases. In selling land and distributing the proceeds among the parties entitled, the Court is certainly engaged in administration business; and in some particulars the proceedings approach nearly to those of an action for the execution of the trusts of a settlement or will, or the administration of an estate. Yet I think it would be unsatisfactory to treat the proceedings as more than analogous, and it is proverbially unsafe to press an analogy to the extreme limit. Partnership actions are also of an administrative character, and it is now settled that in an ordinary case the costs of all parties are paid out of the entire estate; but they frequently disclose reasons for the exercise of discretion in departing from this rule, and the question respecting the costs of an incumbered share is not likely to arise. I am not aware of any case in which it has ever arisen; and there is no other branch of equitable jurisdiction which affords me any assistance by analogy or otherwise.

Mr. Justice *North* places in the forefront of his judgment the question, What is a share? And he concludes that the shares ought to be taken to be as they are ascertained at the time when the Chief Clerk's certificate is made finding who are the persons interested in the property. With this I am unable to agree. I concur with him in seeing no reason why, simply because fifty years ago the property happened to go in moieties, all the costs in connection with the shares afterwards coming into existence should be measured by the original devolution; but it does not seem to me to follow that the Chief Clerk's certificate is the necessary or proper guide. When first I took this matter into consideration it seemed necessary to determine the question thus put by Mr. Justice *North*, and it also seemed to be one of considerable difficulty. On reflection, I think that it need not be determined now, and possibly it may never be necessary to lay down any definite rule, or to say to what extent an assignment will operate to create a new share so as to give the owner thereof a separate set of costs out of the entire fund. This, however, is, to my mind, safe and sound. A mortgage merely creates a new

interest in the share comprised in it, and does not create a new share. Property held by several in common is not held in more shares after the execution of a mortgage by one of the tenants in common than it was before. If there were an actual partition of the property, the mortgagor and the mortgagee would get only one severed portion, and they take only one share of the proceeds of sale. A man advancing money on the security of an undivided share of real estate must be taken to be aware that the entirety is liable to be sold at the suit of one or more of his co-proprietors, because a sale is recognised as a proper and convenient method of division among the parties entitled, and that, therefore, the mortgaged share may be compelled to bear its proportion of the costs occasioned by a sale of the whole. But what justice is there in allowing him to insist that his co-proprietors shall be burdened with extra costs, only because the share in which he is interested has been mortgaged? It is right for him to take into account, in calculating the money which he is prepared to advance, the probability of the gross value of his share being reduced by its proportion of the general costs, and he can also take into account the costs which the share itself will have to bear just as much as if he were contemplating a sale of that share alone.

On principle, therefore, and by analogy to the practice in administration actions so far as that analogy is applicable, I am of opinion that as a general rule, and without pretending to limit judicial discretion, only one set of costs should be allowed out of the entire proceeds of sale in respect of each share of the property which those proceeds represent. There certainly is no authority except *Belcher* v. *Williams* (1) to prevent the adoption of that rule; and notwithstanding Mr. Justice *North's* judgment, which I have studied with deep attention and respect, I venture to think that it ought to be adopted.

I therefore hold that, in this case, there must be three sets of costs only. The practice in administration actions has been to give a mortgagee, and, where there is more than one, the first mortgagee, the full benefit of the one set of costs allowed in respect of a mortgaged share; and that practice ought, I

(1) 45 Ch. D. 510.

KEKEWICH, J.
1893
CATTON v. BANKS.

conceive, to be followed in partition actions. That was the course pursued in *Cleverton* v. *Cleverton* and in *Riddell* v. *Evans*, and it will be pursued here.

Solicitors: *Chamberlayne & Short; H. Hope Shakespear; C. E. Bird; Hamlin, Grammer, & Hamlin*, agents for *Dowling, Urry, & Hamer, Bolton; Wedlake, Letts, & Wedlake; E. Huelin.*

G. I. F. C.

THORNLEY *v.* THORNLEY.

ROMER, J.

1893

Feb. 2, 3, 4.

[1891 T. 347.]

Husband and Wife—Tenancy by Entireties—Effect of Dissolution of Marriage—Joint Tenancy—Separation—Right to Account—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 5—4 & 5 *Anne, c.* 3, *s.* 27.

Where husband and wife are tenants by entireties, a decree absolute for dissolution of marriage makes them joint tenants, and the former wife is entitled to an account of rents and profits as from the date of the decree.

Where real estate has been conveyed, since the coming into operation of the *Married Women's Property Act,* 1882, to a husband and wife jointly (even if they were married before the Act), they take as joint tenants, the wife's interest belonging to her for her separate use; and she is entitled to an account of rents and profits as from the date when she and her husband ceased to live together.

CAROLINE RUTH THORNLEY and *Joseph Thornley* were married in 1860, and no settlement was made on the marriage.

For many years they carried on the businesses of pedlars and furniture dealers, but under circumstances which the Court held did not make either business the separate property of the wife.

Considerable sums of money, principally, if not entirely, derived from the businesses, were from time to time invested in the purchase of real estate, which was conveyed by several deeds, both before and after the coming into operation of the *Married Women's Property Act,* 1882. The deeds, the effect of which is stated below, are examples of the manner in which the property was conveyed.

By an indenture dated the 15th of January, 1876, and made between *H. C. Best* of the one part, and *Joseph Thornley* and *Caroline Ruth,* his wife, of the other part, *H. C. Best,* in consideration of £615 expressed to be paid to her by *J. Thornley,* conveyed to *J. Thornley* and his heirs a piece of land at *Southsea,* to hold the same unto *J. Thornley* and his heirs, "To such uses, for such estates, and in such manner as the said *Joseph Thornley* and *Caroline Ruth,* his wife, shall by any deed or deeds jointly appoint; and in default of such appointment, and so

ROMER, J.
1893
THORNLEY
v.
THORNLEY.

far as any such appointment (if incomplete) shall not extend, to the use of the said *Joseph Thornley* and *Caroline Ruth*, his wife, during their joint lives without impeachment of waste; and from and immediately after the decease of such one of them, the said *Joseph Thornley* and *Caroline Ruth*, his wife, as shall first die, to such uses, for such estates, and in such manner" as the survivor should by deed or will appoint; and in default of such last-mentioned appointment, and so far as any such appointment, if incomplete, should not extend, "to the use of the survivor of the said *Joseph Thornley* and *Caroline Ruth*, his wife, his or her heirs or assigns, for ever."

By an indenture dated the 27th of July, 1876, a similar conveyance was made of other land and buildings from *Jane Dash* in consideration of £260.

By an indenture dated the 13th of January, 1883, and made between *Thomas Maidment* of the one part, and *Joseph Thornley* and *Caroline Ruth*, his wife, of the other part, in consideration of £515 expressed to be paid by *Joseph Thornley* and *Caroline Ruth*, his wife, *Thomas Maidment* conveyed to *Joseph Thornley* and his heirs a piece of land and two messuages at *Southsea*, to hold the same to *Joseph Thornley* and his heirs to uses which were similar to those declared in the deeds executed in 1876.

By an indenture dated the 27th of February, 1884, in consideration of £2090 paid by *Joseph Thornley* and *Caroline Ruth*, his wife, *Mark Morgan* and *George Dimmer* conveyed to *Joseph Thornley* and his heirs certain lands and messuages in *Portsea*, to hold the same unto *Joseph Thornley* and his heirs, to such uses, upon such trusts, and for such purposes, and generally in such manner as *Joseph Thornley* and *Caroline Ruth*, his wife, should by deed jointly appoint, and in default thereof, and subject thereto, to the use of *Joseph Thornley* and *Caroline Ruth*, his wife, during their joint lives, and, after the determination of that estate, to the use of the survivor in fee simple.

By an indenture dated the 9th of May, 1888, in consideration of £625 paid by *Joseph Thornley* and *Caroline Ruth*, his wife, certain lands and hereditaments in *Southsea* were conveyed by *J. H. Page* to *Joseph Thornley* and *Caroline Ruth*, his wife, in fee simple, to such uses as they should by deed jointly appoint, and

in default thereof to the use of *Joseph Thornley* and *Caroline Ruth*, his wife, and the survivor of them in fee simple.

By an indenture dated the 9th of August, 1888, and made between *A. L. Owen* and *W. H. Underhill* (thereinafter called the vendors) of the first part, *Caroline Ruth Thornley*, the wife of *Joseph Thornley*, of the second part, *Joseph Thornley* of the third part, and *F. Bevis* of the fourth part, in consideration of £400 expressed to be paid by *C. R. Thornley* out of moneys belonging to her for her separate use, the vendors conveyed a piece of land at *Southsea* to *C. R. Thornley* in fee simple as and for part of her separate estate. And by an indenture indorsed on the last-mentioned deed, and dated the 18th of August, 1888, *C. R. Thornley*, as beneficial owner, conveyed the same land to *J. Thornley* in fee simple "to the use of the said *Joseph Thornley* and *Caroline Ruth*, his wife, in fee simple as joint tenants."

By an indenture dated the 29th of September, 1888, *E. A. Sanders*, *W. Barnes*, and *E. J. Sanders*, in consideration of £700 expressed to be paid to them by *Joseph Thornley* and *Caroline Ruth*, his wife, therein called the purchasers, "out of moneys belonging to them on a joint account," conveyed a piece of land and certain messuages at *Southsea* to hold the same "unto and to the use of the purchasers in fee simple."

In 1889 *J. Thornley* and *C. R. Thornley*, having quarrelled, ceased to live together as man and wife, and he remained in receipt of the rents and profits of the properties.

Joseph Thornley afterwards presented a petition for dissolutiou of the marriage. A decree *nisi* for dissolution of marriage was pronounced on the petition on the 2nd of March, 1892, and on the 25th of October, 1892, this decree was made absolute.

C. R. Thornley, on the 27th of February, 1891, commenced an action against *Joseph Thornley*, claiming a declaration that she was beneficially entitled for her separate use to the freehold properties purchased as aforesaid, and absolutely entitled to the businesses and certain furniture, and for accounts of rents and profits from the date of the separation in 1889, and for incidental relief. The action was tried before Mr. Justice *Romer* on the 2nd, 3rd, and 4th of February, 1893, when the principal questions argued were as to the effect of the separation in 1889, and the

ROMER, J.
1893
THORNLEY
v.
THORNLEY.

decree absolute, respectively, on the rights of Plaintiff and Defendant in the properties comprised in the conveyances.

Alexander, Q.C., and *P. B. Abraham*, for the Plaintiff:—

A different law applies to the property conveyed before the coming into operation of the *Married Women's Property Act*, 1882, from that which is applicable to the property comprised in the conveyances executed after the Act came into operation.

Assuming that the land did not belong to the wife for her separate use, the land conveyed before the Act was held by the Plaintiff and Defendant as tenants by entireties. Had they not as husband and wife been one person in law, but separate persons, they would have become joint tenants, and each could have disposed of one moiety of the property without the other; but, being tenants by entireties, the husband might do what he liked with the rents and profits during coverture, but could not dispose of any part of the inheritance without his wife's concurrence: *Williams* on Real Property (1).

On the divorce taking place—at any rate, when the decree absolute for dissolution of marriage was made—the coverture came to an end, and the Plaintiff and Defendant became separate persons and held as joint tenants.

As regards the property conveyed after the Act came into operation, the husband and wife were from the first joint tenants, her interest belonging to her for her separate use: *In re March* (2); *In re Jupp* (3). In each case, therefore, the wife is entitled, as from the date when she is excluded from enjoyment of the rents and profits, to an account of her half-share of the profits of the property held jointly, under the statute 4 & 5 Anne, c. 3, s. 27.

Neville, Q.C., and *W. B. Heath*, for the Defendant:—

There is no provision in the *Divorce Acts* altering the *status* of husband and wife after a dissolution of marriage. The only provision is in sect. 25 of 20 & 21 Vict. c. 85, with reference to the property of a wife who is judicially separated. But the

(1) 9 Ed. p. 217. (2) 27 Ch. D. 166.
(3) 39 Ch. D. 148.

question here is not one merely with reference to the legal estate. In this case there is a resulting trust in favour of the husband.

Alexander, in reply :—

It was necessary, in the case of a judicial separation, to provide how the wife's property was to be held, inasmuch as she remains a married woman; but on a dissolution of marriage the coverture ceases altogether. Where a conveyance is made by a husband in favour of his wife, there is a presumption that an advancement was intended.

ROMER, J. (after dealing with the claim of the Plaintiff that the whole of the business and all the profits and proceeds thereof belonged to her for her separate use, and deciding against such claim on the evidence, continued as follows) :—

Then, with regard to such portion of the Plaintiff's case as depends upon the deeds which have been executed, I will first deal with the deeds which were executed before the coming into operation of the *Married Women's Property Act*, 1882, and which purport to give estates to the husband and wife in terms which would have made them joint tenants if they had not been married. Now, in the eye of the law, they were during coverture one person, and they held the estates by entireties, the husband being entitled to receive the rents during coverture, though neither could deal with the estate apart from the other so as to affect the rights of the survivor. What happened, then, on the divorce taking place? They ceased to be husband and wife—they ceased to be one person; and, in my judgment, they held the estate as ordinary joint tenants, and the husband's right to receive the rents, which existed during coverture, came to an end. From the time of the divorce the wife, being a *feme sole*, became entitled, under the statute of Anne, to an account as a joint tenant against her late husband. It has been agreed before me, without argument and without its being necessary to decide the point, that the account asked for runs as from the date of the decree absolute, and not from the decree *nisi*.

I now have to deal with the estates conveyed after the Act of

ROMER, J.
1893
THORNLEY
v.
THORNLEY.

1882 to the husband and wife in terms which would have given them, if not married, a joint estate. The presumption is, that where a husband's property is conveyed by his directions in such a form as to give the wife an interest, the wife's interest is intended by the husband as an advancement by him, and the presumption is that there is not a resulting trust as between the wife and the husband. In the case before me that presumption is not only not rebutted, but is strengthened, and such interest as the wife obtained from the conveyances I am now dealing with became her own, and she certainly did not hold those interests in trust for her husband. What is the effect of the Act of 1882 upon the interests so given to the wife? In my judgment, the wife's interest, such as it was, clearly became hers for her separate estate, and to hold, not in entireties, but as joint tenant with her husband, her interest as joint tenant being for her separate use. She can accordingly maintain an action for an account against her husband, so far as she has not assented to his receiving her share of the income—that is to say, in the case before me, from the date of the separation in 1889. There is no dispute, I think, between the parties as to that date being the proper date to be considered for the purpose. Of course, so far as the husband has since that date made payment to the wife on account of her separate estate, he will get credit for that in the account; and where the wife's interests with the husband's are jointly covered by a mortgage, the husband will take credit for the interest he has paid on the mortgage debt, and for all outgoings, generally, which were a charge upon the interest. That settles the principle on which the Plaintiff is entitled to recover as against the husband in this action.

Solicitors for Plaintiff: *Emanuel & Simmonds.*
Solicitor for Defendant: *Edwin Wood.*

F. E.

In re THE VARIETIES, LIMITED.

[00198 of 1892.]

VAUGHAN WILLIAMS, J.

1893 Jan. 23; Feb. 7.

Company—Winding-up—Substratum gone—"Just and Equitable"—Petition by Shareholder—Subsequent Voluntary Winding-up — Preponderating Influence—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 79 *sub-s.* 5, 91, 129.

On the petition of shareholders for a compulsory winding-up order, on the ground that the substratum of the company is gone, the Court disregards a special resolution for voluntary liquidation which owes its existence to the preponderating influence of those whose conduct appears to require such investigation as can only be obtained in a winding-up by the Court.

THE *Varieties, Limited,* was registered in August, 1892, under the *Companies Acts,* as a company with limited liability, having a capital of £100,000, divided into 50,000 shares of £2 each; its principal objects, as stated in the memorandum of association, being to adopt and carry into effect, with such modifications as might be agreed on, an agreement dated the 25th of August, 1892, and made between *William Forster Shaw* of the one part, and *Thomas Ross,* as trustee for the company, of the other part; and to undertake and carry on the business of opera-house, theatrical or music hall, or *café chantant* proprietors or caterers for public entertainments, and to undertake and carry out all things incidental to such enterprises.

By the agreement of the 25th of August, 1892, it was provided that *Shaw* should grant to the company, on its incorporation, an underlease of a piece of land having frontages to *Whitcombe Street, St. Martin's Street,* and *Blue Cross Street,* in the county of *London,* for eighty years, less one day, at a yearly rent of £1300; and that *Shaw* should build on the land a theatre of varieties, according to specifications and plans to be approved by the architect of the company, and have it built and completed for the commencement of the business of the company within twelve months of the date of the agreement. For this *Shaw* was to receive from the company £87,000, to be paid, at the option of the directors, either wholly in cash, or, as to one-third thereof, in fully paid-up

VAUGHAN WILLIAMS, J.

1893

In re THE VARIETIES, LIMITED.

shares of the company. The preliminary expenses were to be borne by *Shaw*, and he was to receive £20,000 (part of the £87,000) within fourteen days after the first allotment of shares should take place; and the residue of the purchase-money was to be paid upon the certificates of the company's architect, from time to time, as the work proceeded.

The contract was adopted by the company on the 19th of September, 1892.

The prospectus, issued by the company at the end of September, 1892, contained statements that "plans of the building have been prepared by Mr. *G. H. Greatbach*, the well-known architect," and that the "buildings . . . . will be erected in strict accordance with the known requirements and regulations of the London County Council."

Lieut.-Col. *R. P. Hare* and Mr. *William Terriss*, two of the original directors, thought the number of applications for shares insufficient to justify them in going to allotment, and thereupon retired; but the three remaining directors arranged a modification of the contract, the terms of which modification were embodied in a letter written by *Shaw* to the directors, and dated the 19th of October, 1892, and were subsequently incorporated in an agreement dated the 28th of October, 1892.

The agreement of the 28th of October, 1892, provided that the company should issue to *Shaw* or his nominees so many fully paid-up shares as should represent £47,000 (part of the consideration money payable to him), "less any sum of cash, up to £15,000, received by the company in respect of shares prior to the 1st of May, 1893"; that out of the £15,000 cash so received £500 should be retained for the use of the company; that cash should be paid to *Shaw* as follows: £1000 on the signing of the agreement, a further sum of £1000 on the plans being passed by the County Council, and the balance at subsequent dates. The agreement also provided that shares should be allotted to *Shaw* and his nominees as follows: 5000 fully paid-up shares on the 3rd of November, 1892, in satisfaction of £10,000 part of the above-mentioned sum of £47,000; 5000 fully paid-up shares immediately after the balcony girders of the intended theatre had been placed in manner and according to plans approved of

by the *London* County Council, in satisfaction of £10,000 further part of the £47,000; and other shares sufficient (after taking into such part of the £15,000 as should have been paid by *Shaw*) to make up the balance of the £47,000, at subsequent dates.

In his Lordship's judgment the evidence did not clearly shew how many shares were applied for or allotted to persons other than *Shaw* and his nominees; but the total amount paid into the company's bank in respect of applications for shares was £2875; and out of this the company paid *Shaw* £1000 on the 21st of October, 1892, and £350 in the course of November and December, 1892.

The *London* County Council refused to sanction the plans presented to them, because of the insufficiency of the ground space afforded by the land which was the subject of the lease.

On the 22nd of December, 1892, a petition was presented to the Court by two shareholders of the company, holding respectively seventy-five shares and fifty shares, asking that the company might be wound up by the Court on the ground, in effect, that the substratum of the company had ceased to exist, and that the company could not carry out the purposes for which it was formed, and that it was just and equitable that the company should be wound up by the Court.

At the date of the petition being presented the company had only £993 at the bank.

On the 3rd of January, 1893, a resolution was passed that the company should be wound up voluntarily and appointing the secretary of the company liquidator. At the meeting 4061 votes were recorded, of which 3916 were given in favour of the resolution and 145 against it. Out of the 3916 supporting votes, 3702 were given in respect of shares held by *Shaw* and his nominees. The resolution was confirmed at a subsequent meeting.

In response to a circular issued to the shareholders and inviting them to say whether they were in favour of or opposed to a compulsory winding-up, the holders of 847 shares had replied that they were in favour of a compulsory winding-up.

Farwell, Q.C., and *J. Bradford*, for the Petitioners:—

The company cannot go on for the purposes for which it was

VAUGHAN WILLIAMS, J.

1893

In re THE VARIETIES, LIMITED.

formed. Admittedly, it must be wound up, and there are matters requiring such investigation as can only be obtained in a winding-up by the Court.

Brice, Q.C., and *P. B. Abraham*, for the company:—

There are no interests of creditors to be considered, for practically there are no creditors. It is doubtful, therefore, whether the Court can take the liquidation out of the hands of the shareholders after they have resolved on a voluntary liquidation; certainly the Court ought not to make a compulsory winding-up order on the petition of those who hold such a small number of shares. Sect. 91 of the *Companies Act*, 1862, requires the Court to regard the wishes of the contributories, and the wishes of the general body of shareholders have always been regarded: *In re Langham Skating Rink Company* (1); *In re Middlesborough Assembly Rooms Company* (2). A shareholder is not entitled to a compulsory winding-up order after resolutions have been passed for a voluntary liquidation unless he can shew that the passing of the resolution was obtained by fraud: *In re Gold Company* (3). The grounds for ordering a company to be wound up have not been extended by the *Companies (Winding-up) Act*, 1890, except perhaps where the interests of creditors are at stake, as in *In re Krasnapolsky Restaurant and Winter Garden Company* (4). [They also referred to *In re Doré Gallery* (5).]

Higgins, also opposed the petition on behalf of a shareholder.

Farwell, in reply:—

Sects. 51 and 129 of the *Companies Act*, 1862, require a three-fourths majority in favour of voluntary liquidation. But, after the votes of the vendor and his nominees have been deducted there is not a three-fourths majority of independent shareholders, and the resolutions cannot therefore be regarded as an indication of the wishes of the contributories. When it has become impossible for the company to carry on the business for which it was formed, it is "just and equitable that the company should be

(1) 5 Ch. D. 669.
(2) 14 Ch. D. 104.
(3) 11 Ch. D. 701.
(4) [1892] 3 Ch. 174.
(5) W. N. (1891) 98.

wound up" within the meaning of sect. 79, sub-sect. 5, of the *Companies Act*, 1862: *In re Suburban Hotel Company* (1).

1893. Feb. 7. VAUGHAN WILLIAMS, J.:—

This is a petition by two shareholders, who allege in substance that the company ought to be compulsorily wound up because its substratum is gone and it is impossible for the company to carry out the purpose for which it was formed.

[His Lordship stated the objects with which the company was formed, and the effect of the agreement of the 25th of August, 1892, and the modifications thereof, and continued:—]

These shares were to be issued to the vendor by instalments as the works proceeded. Apparently the cash payments provided by the original contract are regulated by the letter of the 19th of October incorporated in the modified agreement.

It does not appear by the original contract that at this time there was any plan in existence, or any architect of the company, although I suppose that Mr. *Shaw* had in effect prepared plans himself.

The affidavits do not make it very clear what exact number of shares, other than vendor's shares, was in fact applied for and issued; but the total amount paid into the company's bankers in respect of applications seems to have been £2875, and the whole available cash of the company was, one would have thought, plainly insufficient to enable the company to carry out the contract. The company seem to have paid Mr. *Shaw* £1000 on the 21st of October, and £350 in the course of November and December, and it had a balance at its bankers of £993. So that a sum of £532 was paid away besides the payments to *Shaw*. This sum went probably in legal costs and office expenses, and the money paid to *Shaw* seems to have been paid for plans to be submitted to the *London* County Council, who afterwards refused to sanction them. On the 22nd of December, 1892, the present petition was presented.

On this state of things, leaving out of consideration the subsequent action of the company, it is plain that the substratum of the company is gone, and that, in view of the want of

(1) Law Rep. 2 Ch. 737.

VAUGHAN WILLIAMS, J.

1893

In re THE VARIETIES, LIMITED.

funds and the refusal of the *London* County Council to sanction the plans, the scheme of the company cannot be carried through, especially as the refusal of the County Council was, I gather from the evidence, based on the insufficiency of the ground space afforded by the land which is the subject of the lease.

Since the presentation of the petition the company have passed a special resolution for voluntary liquidation with the secretary as liquidator, and that resolution has been confirmed. It seems clear, therefore, that there must be a liquidation, and the only question which I have to decide is as to the mode of liquidation—shall it be voluntary or compulsory? It is said on behalf of the company that the shareholders have expressed a clear wish in favour of voluntary liquidation, and that the petition is a wrecking petition by two shareholders who hold only seventy-five and fifty shares each, and that a compulsory order will largely increase the costs of liquidation. It is said on behalf of the Petitioners, that the voting at the meeting of shareholders is deceptive, for that the voting was largely by fully paid-up shareholders composed of *Shaw* and his nominees.

There were 4061 votes recorded at the meeting, of which 3916 were in favour of voluntary liquidation. From this number must be deducted 3702 votes, in respect of shares held by *Shaw* and his nominees, leaving only 214 independent votes in favour of voluntary liquidation.

Against the resolution 145 votes were recorded, which, with the 214 independent votes in favour of it, make 359 independent votes. If this is so, and the votes in respect of shares held by the vendor and his nominees are excluded, it would seem that, out of the residue of 359 votes, 214 were recorded in favour of voluntary liquidation and 145 against it; whereas, in order to obtain the majority requisite, three-quarters, or 269 votes, should have been recorded in favour of voluntary liquidation. It is further said that the holders of no less than 847 shares have signed circulars in favour of compulsory liquidation, and the originals of those circulars have been produced before me, although the shareholders themselves have not thought fit to appear and support the petition. It is said, however, that on these facts it is clear that, if you exclude the preponderating vote

in respect of the fully paid-up shares held by the vendor and his nominees, the majority of the independent shareholders wish for compulsory liquidation. It is said further, that there are matters here which require to be investigated. Why did the directors proceed to allotment? Why did they pay £1300 to Mr. *Shaw* before the plans had been approved by the *London* County Council? I am not sure that the first of these matters can be investigated at the instance of shareholders to whom the shares were allotted; but I think there is enough here to make it my duty to order a compulsory winding-up.

Having regard to the rule laid down by Lord Justice *James*, in *In re Gold Company* (1), I am not bound to regard the wishes of *Shaw* and his nominees when they are merely the wishes of the vendor, the individual who is the principal person interested in having the liquidation conducted by the late secretary of the company, who is not likely to be a proper person to make an investigation into the affairs of the company. I must also bear in mind that, although at these meetings, apparently called after the presentation of the petition, there seems to have been a technical majority in favour of a voluntary winding-up, yet I am bound to have regard to the wishes of the shareholders, as expressed in the signed circulars which have been put in evidence.

Under these circumstances, I think it is my duty to consider what should be done in the interest of the independent shareholders—who have been induced to pay money for their shares. It may be that, when the whole matter is gone into, there will be no ground for making any imputation against the persons who have been concerned in the formation, promotion, or conduct of the business of the company; but still it may be that those directors who remained in office, and, after making allotments on this small amount of capital, proceeded to pay a large part of it to *Shaw* and others, will not be able to justify their conduct in that respect; and I think it better that the liquidation should not be conducted by the late secretary—who may possibly have approved of every step taken—but by someone who has had no previous connection with the company. Sometimes the costs of

(1) 11 Ch. D. 701, 709.

VAUGHAN WILLIAMS, J.

1893

In re THE VARIETIES, LIMITED.

a compulsory liquidation may be greater than the costs of a voluntary winding-up; but, having regard to the circumstances of this company, and to the fact that no large accounts will have to be gone into or large assets collected, and that only an investigation of the circumstances under which the allotment was made to *Shaw* and others will be required, there is no reason to suppose that the costs of a compulsory winding-up will be larger than those of a voluntary liquidation.

In my judgment, therefore, it is in the interest of the independent shareholders that I should make a compulsory order.

Solicitors for the Petitioners: *Vallance & Co.*
Solicitors for the company: *Bridger & Son.*
Solicitors for the opposing shareholders: *Beall & Co.*

F. E.

VAUGHAN WILLIAMS, J.

1892 *Dec.* 3, 17.

1893 *Jan.* 12, 13, 23; *Feb.* 13, 14.

In re BOROUGH COMMERCIAL AND BUILDING SOCIETY.

[1892 B. 1199.]

Company—Unlimited Liability—Memorandum and Articles of Association—Power to allow Members to withdraw from Liability—Right to withdraw in Absence of Express Power.

There is nothing in the *Companies Acts* to prevent an unlimited company being associated on the terms that its members may withdraw from membership in the mode pointed out by its memorandum and articles of association, so as to be free from liability in the event of a winding-up.

Semble, that such a company may validly provide by its memorandum and articles for a return of capital to its members.

Trevor v. *Whitworth* (1) distinguished.

Quære, whether, in the absence of express power in its memorandum or articles of association, an unlimited company can allow its members to withdraw from liability as such.

THE *Borough Commercial and Building Society* was registered on the 25th of March, 1883, as a company with unlimited liability.

The memorandum of association was intituled, "The *Companies Acts*, 1862 to 1880. Unlimited Company."

(1) 12 App. Cas. 409.

Clause 3 of the memorandum was as follows:—

"3. The objects for which the company is established are:—

"(*a*) To accumulate capital by means of monthly subscriptions from members, and also to raise funds by borrowing money from members or other persons or companies, on such security and on such terms as the committee may deem conducive to the interests of the company.

"(*b*) To advance or lend any portion of the said capital or funds to members or other persons on the security of real or personal property, bills of exchange, bills of sale, promissory notes, machinery, stock-in-trade, and such other security as the committee may deem sufficient.

"(*c*) To purchase or otherwise acquire any land or buildings on any tenure, and any other kind of property, whether on land or sea, in the *United Kingdom*, the British colonies, or in any foreign country, and to sell, mortgage, let, work, develop, or otherwise dispose of the same, or any part thereof.

"(*d*) To receive money on deposit from members or other persons or companies, at such rate of interest or on such terms as may be agreed upon, and to issue debenture bonds or other securities based upon any of the real or personal property of the company, and

"(*e*) To do all such other things as may be incidental or conducive to the attainment of the above objects or any of them."

The articles of association, so far as material, were as follows:—

"2. The capital of the society shall not be of any fixed nominal amount, and shall be divided into shares of the ultimate value of £50 each. The shares shall be paid up by contributions of 10*s*. per month for each share taken up, and all contributions and other moneys shall be paid at the registered office of the society, *Imperial Chambers*, 24, *Queen Street, Huddersfield*, on the second Wednesday of each month, from eight to nine o'clock in the evening, or at such other place and time as the committee may from time to time appoint.

"3. Every person shall be deemed to be a member of the society who shall become possessed of a share either by original

VAUGHAN WILLIAMS, J.

1893

In re BOROUGH COMMERCIAL AND BUILDING SOCIETY.

allotment, transfer, or transmission, and upon his name being entered on the register of members of the society."

"9. Any member desirous of withdrawing from the society before his share or shares are fully paid shall give one calendar month's notice in writing to the secretary, and if the committee allow his withdrawal, he may on payment of all fines or other moneys due to the society receive back his subscriptions according to the following scale, or such other terms as the committee may decide:—Withdrawal during first year of membership, for every £1 paid, 18*s.*; withdrawal during second or third year of membership, every £1 paid, 19*s.*; withdrawal during fourth or any subsequent year of membership, for every £1 paid, 19*s.* 6*d.*"

"39. Any member wishing to receive an advance from the society shall apply to the committee, and state the security he proposes for the loan, and the committee shall decide whether the loan be made on the security offered, and shall cause all such inquiries and arrangements to be made, and do all things in and about the matter which they may think necessary. All loans shall bear interest at £5 per cent. per annum, such interest to be paid monthly along with the subscription, and in calculating such interest the monthly subscriptions, from time to time paid by the borrower, are not to be taken as reducing the amount of the loan. Any member may, subject to these articles, receive a loan from the society equal to the amount he has paid into the society, subject to the former part of this article, on his giving his own promissory note for the amount, such note to carry interest at £5 per cent. per annum. All the costs and expenses of or in any way connected with the giving or taking any security as aforesaid shall be paid by the borrower. All promissory notes, receipts, or other securities shall be attested by the secretary or his deputy, or by a member of the committee or a solicitor."

"40. When there is a surplus of funds in hand, and no member is desirous of a loan, the committee shall have power to appoint a ballot for all undrawn shares in amounts of not more than £50, and the members drawn shall take up the amount in rotation as fixed by the ballot, and find proper security, or forfeit the sum of two shillings and sixpence per share. Ten days' notice to the member of the time fixed for receiving his share shall be given;

and if at the time appointed the share be not drawn, or the fine paid, the member shall be charged with interest as if he had drawn his share."

In 1883, *Thomas Sellars* and *Samuel Wood*, who were then in partnership together, applied to the society for a loan of £1200, and on the 12th of September, 1883, the signature of their firm of "*Sellars & Wood*," was affixed to the society's application book, which was headed "Roll of Persons applying for Membership in the *Borough Commercial and Building Society*, registered under the *Companies Acts*, 1862 to 1880. We the undersigned respectively apply for membership in the above society, and agree to conform to all the articles and regulations of the said society."

The loan was made to them in the month of October, 1883, on the security of the joint and several promissory notes of themselves and their sureties.

They paid £2 4*s.* as entrance fee, and received a pass-book containing a certificate, signed by the secretary of the society, stating the share numbers of twenty-four shares in the society taken by them, their names, address, and business, and that they were duly enrolled members of the society. Beyond this there was no allotment of shares.

They paid £17 per month to the society (made up as follows: £5 for interest on the loan at £5 per cent. and £12 on the twenty-four shares entered as taken by them) up to May, 1889, when the partnership between them was dissolved.

Sellars continued paying the subscriptions till 1889, when he got into difficulties, and executed a deed of assignment for the benefit of his creditors.

The society credited the subscriptions paid as part payment of the amount due to them, including the loan, and by means of the subscriptions the amount due in respect of loan and subscriptions was reduced to £304 5*s.* 5*d.*

Sellars being in arrear with his subscriptions, the society, on the 14th of March, 1890, commenced an action against him and *Wood* and their sureties, on the promissory note for the amount due.

Wood paid the society's solicitors £100 after the action had

VAUGHAN WILLIAMS, J.

1893

In re BOROUGH COMMERCIAL AND BUILDING SOCIETY.

been brought, and on the 2nd of February, 1891, paid them a further sum of £224 9*s.* 5*d.*, receiving from them the following receipt: "Received of Mr. *Samuel Wood* the sum of £224 5*s.* 9*d.*, which (*sic*) with £100 previously paid by him to us in full satisfaction and discharge of debt and costs in this action, *Borough Commercial and Building Society* v. *Sellars, Wood, and Others* (1890 B. 93), Queen's Bench Division, *Huddersfield* District Registry, and of all claims and demands of the said society upon the said *Samuel Wood.*"

Collingwood Lunn, who was not then a member of the society, on the 17th of May, 1883, required a loan of £250, and signed a similar application for membership in the "roll of members." He also received a pass-book for five shares, and on the 19th of December, 1887, he paid off the amount due from him.

Neither *Wood* and *Sellars* nor *Lunn*, after making payment of the amount claimed from them, received any further notices from the society as to its meetings or transactions.

At an extraordinary general meeting of the society, held on the 24th of April, 1891, extraordinary resolutions were passed—(1.) that it had been proved to the satisfaction of the meeting that the society could not, by reason of its liabilities, continue its business, and that it was advisable to wind up the same, and accordingly that the society be wound up voluntarily; and (2.) that *J. F. Dyson* should be appointed liquidator of the society for the purposes of such winding-up.

The liquidator settled *Lunn, Sellars, & Wood* on the list of contributories—*Lunn* for five shares, and *Sellars & Wood* for twenty-four shares.

A call of £5 per share was made on the 13th of November, 1891, and notice thereof was on the same day sent to the contributories.

A summons was taken out by the liquidator on the 11th of March, 1892, before Mr. Justice *Stirling*, asking that the several persons named in the second column of the schedule thereto, including *Collingwood Lunn, Thomas Sellars*, and *Samuel Wood*, might be ordered to pay to the liquidator the several sums set opposite their respective names in such schedule, being the amounts due from them in respect of a call of £5 per share made

by the liquidator—*i.e.*, £25 alleged to be due from *Collingwood Lunn* in respect of five shares, and £120 alleged to be due from *Sellars* and *Wood* in respect of twenty-four shares.

The application was afterwards transferred to Mr. Justice *Vaughan Williams.*

Farwell, Q.C., and *J. D. Davenport*, for the liquidator:—

The respondents all became members of the society and borrowers from it, and no objection can be taken on the ground that *Sellars & Wood* were a partnership firm: *Weikersheim's Case* (1); *Niemann* v. *Niemann* (2). The respondents have paid off the loans made to them, and certain subscriptions on their shares; but they have not ceased to be members. Their liability is unlimited, and it is not competent to an unlimited company to allow its members to withdraw themselves from liability on their shares.

It was never intended to release the Respondents from their liability as shareholders in consideration of what they repaid as borrowers. The society were merely suing *Wood* for the balance of the amount lent. If there had been such an intention, the transaction would have been invalid as a purchase by a company of its own shares: *Trevor* v. *Whitworth* (3). It is true that that was the case of a limited company; but in an unlimited company a provision is invalid under which the society might, on the eve of winding up, allow all its solvent shareholders to withdraw, leaving only paupers liable to make the calls required to pay the company's debts. No compromise between the society and a shareholder can affect the rights of the society's creditors.

Art. 9 does not apply to the withdrawal of a borrowing member. If he has paid off the loan, all he can do is to transfer his shares. By doing that he is qualified to get another advance from the society, for he gets the benefit of the company during the whole time he is a member of it.

The committee had no power to accept the suggested surrender of shares, nor could *Wood* alone accept a surrender, for the shares stood in the name of himself and *Sellars*, and are a property, not

(1) Law Rep. 8 Ch. 831. (2) 43 Ch. D. 198.
(3) 12 App. Cas. 409.

VAUGHAN WILLIAMS, J.

1893

In re BOROUGH COMMERCIAL AND BUILDING SOCIETY.

a mere liability. The receipt does not purport to assign the shares.

[They also referred to *Grant* on Corporations (1).]

Leverson, for *Lunn*:—

The Court may draw from the facts the inference that there was an agreement between the society and *Lunn* that his shares should be cancelled, and it was the duty of the society to see that his name was removed from the list of members. He is not therefore liable as a contributory: *Marshall* v. *Glamorgan Iron and Coal Company* (2).

[He also referred to *In re Denver Hotel Company* (3).]

R. W. Harper, for *Wood*:—

The memorandum of association allows the society to lend either to members or to other persons. *Wood* became a borrower from the society, but never a member, for he never applied for shares. If he was originally a member, he ceased to be such on paying to the society what was due to him in respect of his shares and in respect of the amount borrowed by him. In the first place, what occurred in the action operated as a novation, and released *Wood* from all liability to the society, whether as a borrower or a shareholder. But, apart from this, by paying what was due from him *Wood* ceased to be a member. The payment of subscriptions under clause 3 of the memorandum of association is identical with the payment of contributions under arts. 2 and 39, and when all the instalments are paid up, whether they are called subscriptions or contributions, the indebtedness to and the membership in, the society came to an end. Art. 9 shews that a man may withdraw from membership, with the consent of the committee, even when his shares are not fully paid up—*à fortiori*, he may withdraw when he is a fully paid-up shareholder. An unlimited company may be lawfully so constituted that its officers have power to allow persons to withdraw from membership in it. *Trevor* v. *Whitworth* (4) was the case of a limited company, and has no application to an unlimited company like this

(1) Pages 267, 268.
(2) Law Rep. 7 Eq. 129.
(3) [1893] 1 Ch. 495.
(4) 12 App. Cas. 403.

society. If the society could provide for such withdrawals, its constitution gives power to allow such withdrawal, and such power was exercised in *Wood's* case, and he is not liable to pay any calls.

Farwell, in reply.

VAUGHAN WILLIAMS, J. (after stating the effect of the summons, continued as follows):—

This company is an unlimited company, and the question raised is of considerable importance. The Respondents, in my judgment, became members of this society, and after they had become members of the society became borrowers from it. They had, before the winding-up, paid off the loans paid to them by the society and the interest and other payments due from them, and they now contend that, by reason of their having paid off those loans, they ceased to be members of the society, and that, having ceased to be members of the company, they are not liable to be placed on the list of contributories, or to pay anything in respect of the shares which, undoubtedly, at one time were held by them. The circumstances of the two cases are a little different. *Lunn* simply borrowed a sum of money in 1883, and paid it off in 1887; but he was not a member of the society when he proposed to borrow from it. *Sellars & Wood* wished to borrow £1200 from the society. At the time when they proposed to borrow from the society neither *Sellars* nor *Wood* was a member of the society. They became members of the society for the purpose of enabling them to borrow this money. Although it is true that under clause 3 (*b*) of the memorandum of association the society had power "to advance or lend any portion of the said capital or funds to members or other persons on the security of real or personal property, bills of exchange, bills of sale, promissory notes, machinery, stock-in-trade, and such other security as the committee may deem sufficient"—in fact, this society never lent to persons other than members except in the case of kindred societies. Very unfortunately, societies like this have adopted a practice of acting in conjunction, one with another, by from time to time accommodating each other with loans

VAUGHAN WILLIAMS, J.
1893
In re BOROUGH COMMERCIAL AND BUILDING SOCIETY.

according to their existing wants. One society when pressed gets assistance from another kindred society; and in another year the society which has thus afforded pecuniary assistance in its turn asks for and obtains the like assistance. But this society in practice never made advances to individuals other than its own members, and *Lunn* and *Sellars & Wood* became members of the society solely for the purpose of getting loans from it. Nothing turns on the circumstances of *Lunn's* case beyond those which I have stated. But I must deal in detail with the circumstances of the loan to *Sellars & Wood.* The society required that *Sellars & Wood,* as a condition of obtaining the loan, should take up a number of £50 shares equal in amount to the loan required, and, as they required a loan of £1200, they had to take up twenty-four shares of £50 each. On taking up these shares they all had to pay, or were debited with, an entrance fee of 2*s.* per share; and I am satisfied on the evidence that the entrance fee was not credited as a part repayment of the capital of the loan, or of interest on the loan. It was contended, on behalf of *Sellars & Wood,* that they did not intend by what they did to become members of the society, but merely to borrow the £1200; but it is perfectly clear that, whatever they thought, they did become members of this society. Having become members, and having then borrowed these sums, they went on paying the subscriptions and interest in pursuance of art. 39, and after a time they dissolved partnership; and from that time forward the society in practice only looked to *Sellars.* They received payment from Mr. *Sellars,* and gave receipts to him. [His Lordship stated that there was strong evidence of a novation; but that it was unnecessary to decide that question, and that, having regard to the action brought against *Wood* and the payments made by him, it would be difficult for him now to set it up, and continued as follows:—]

After the dissolution of *Sellars & Wood,* and after *Sellars* had liquidated his affairs, the society demanded payment from *Wood.* They brought an action which, so far as the writ is concerned, was an action on a promissory note, though the statement of claim was wider, and in the result *Wood* paid all that was due from him in respect of the sum of money that had been

borrowed. I am not sure how the matter was calculated; but I find as a fact that the society accepted from *Wood* the amount which he paid in full discharge of his liability in respect of the loan. Subsequently to the payment of their loans by *Wood* and *Lunn*, no application was made by the society for payments of any amount per share, and, moreover, no notices were sent to *Lunn*, or *Sellars & Wood*, or *Wood*, as members, up to the time when the society passed resolutions for voluntary liquidation.

I wish to deal first with the facts of this case, and I find as a fact that the intention of the company, with reference both to *Lunn* and to *Sellars & Wood*, was to accept the total sums which were paid by them in full satisfaction of all claims of any sort or kind of the society upon these members; that the intention of the society was that upon payment of these sums these members respectively should be treated as persons who had withdrawn from membership; and that not only was this the intention of the society in the case of the particular persons who are Respondents to this summons, but that it was the general practice of the society that any person who only held shares corresponding to a loan which he had taken up from the society should, *ipso facto*, cease to be a member of that society as soon as he had paid the amount of the loan and fines, and other amounts which were due from him to the society.

I believe that if any officer of the society had been asked, during the currency of the society and before its winding-up, whether persons who had paid off these loans continued to be members of the society, the answer would have been unhesitatingly in the negative. I am not forgetting that in the case of some members of the society, who were borrowers and had paid off the loans due from them to the society, there was at the time of the acceptance of the payment a reservation of the liability of those particular persons as members. But these do not seem to me to be ordinary instances, or to be in accordance with the usual practice of the society, and I can only draw the inference that in those cases there was some special reason for reserving the liability; they may, for aught I know, have been holders of other shares than those they took up in respect of the loan, or there may have been other sums outstanding from them. I

VAUGHAN WILLIAMS, J.

1893

In re BOROUGH COMMERCIAL AND BUILDING SOCIETY.

cannot say what the reasons may have been; but, according to my judgment, as a matter of fact this society was conducted upon the basis that those who took up shares for the purpose of obtaining a loan were to be allowed to withdraw, and treated as having withdrawn, on the payment off of those loans. That being the conclusion in fact that I have arrived at, the result would be that if it was in law competent for the officers of the society so to deal with its members, the members of the society so dealt with would in law cease to be members of the company, and, therefore, not be liable to be placed upon the list of contributories.

The question, however, remains whether it was competent for the officers of the society so to deal with the matter. Now, if this company had been a limited company, there could be no doubt that, according to the decision in *Trevor* v. *Whitworth* (1), no such arrangement would have discharged those persons. When I say, however, that no such discharge would have freed the members or caused them to cease to be members, I feel that I am rather comparing things that it is impossible to compare, because if this had been a limited company, and a person had £50 shares in it, the payment of £50 would have exhausted his liability, limited as it was by the £50; and it is a little difficult to put the hypothesis to one's mind of the liability of a shareholder in a limited company continuing after the payment of the £50, because one has to present to one's mind a figure which is not there—that is to say, some figure imposing a limit of liability which is not exhausted by the payment of the £50. But I cite the case because I wish to point out that I am not overlooking the fact that it is there laid down that a person who has once become a member of a limited company can practically only get rid of his liability, otherwise than by payment or transfer, in the case of forfeiture, and not always then.

But it seems to me that *Trevor* v. *Whitworth* is useful as an authority in the present case rather for the observations which were made by Lord *Herschell* at p. 415 of the report than for any other purpose. Lord *Herschell* says: "I will first consider the question apart from authority, and then examine the deci-

(1) 12 App. Cas. 409.

sions relied on. The *Companies Act*, 1862, requires (sect. 8) that in the case of a company where the liability of the shareholders is limited, the memorandum shall contain the amount of the capital with which the company proposes to be registered, divided into shares of a certain fixed amount; and provides (sect. 12) that such a company may increase its capital and divide it into shares of larger amount than the existing shares, or convert its paid-up shares into stock, but that, 'save as aforesaid, no alteration shall be made by any company in the conditions contained in its memorandum of association.' What is the meaning of the distinction thus drawn between a company without limit on the liability of its members and a company where the liability is limited, but, in the latter case, to assure to those dealing with the company that the whole of the subscribed capital, unless diminished by expenditure upon the objects defined by the memorandum, shall remain available for the discharge of its liabilities? The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations authorized. Of this all persons trusting the company are aware, and take the risk. But I think that they have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders." Now, it is remarkable that Lord *Herschell* says this of a limited company, and points out that this is something which makes a distinction between a limited company and an unlimited company; and I am therefore of opinion that, in the view of Lord *Herschell*, expressed in these observations—I do not say it is a judgment, but it is the view of Lord *Herschell*—the matters which he mentions, as distinguishing a company limited from a company unlimited, do not apply to a company unlimited.

I am of opinion further, having carefully looked through the *Companies Acts*, 1862 and 1867, that there is nothing to prevent a company unlimited from providing by its memorandum of association and its articles for a return of capital to the members of the partnership, or for a withdrawal of members from the

VAUGHAN WILLIAMS, J.

1893

In re BOROUGH COMMERCIAL AND BUILDING SOCIETY.

company. I wish it to be distinctly understood that I am not saying that in the case of a company unlimited, a company with no fixed amount of capital, the officers of the company could, in the absence of any provision for the withdrawal of members, arrange with a member for his withdrawal, so as to discharge him from liability to creditors in the event of a liquidation. I thought there was a great deal in the argument addressed to me by Mr. *Farwell*, that it never could have been intended by the Legislature that the law should be in such a condition that, whenever the affairs of a company seemed to be in an unfavourable condition, the more solvent shareholders should be in a position to go to the insolvent shareholders, who had nothing to lose, and say to them: "Pass a resolution consenting to our withdrawal; and then the liquidation may follow, and the creditors will get what they can get, and we shall be none the poorer." It does seem to me that that would be an unsatisfactory state of the law, and I much doubt whether such a withdrawal would be of any validity as against creditors; but that is not the question I have to decide, and I do not decide it one way or the other. I do not say that the withdrawal would be valid; I do not say that it would not be valid. All that I am now affirming by my judgment is, that there is nothing in the words or in the spirit of the Acts of Parliament which prevents an unlimited company being associated on the terms that members may withdraw in the mode which is provided by the particular memorandum of association or articles. It seems to me that if one limits the matter in that way, the creditors would have nothing to complain of. They would be able to look at the articles; they would find by the articles that a member could withdraw by doing particular acts, and, if a large number of members happened to have withdrawn by taking advantage of those provisions, the creditor of the company, who would have due notice if he chose to read the memorandum and articles of association, would have nothing to complain of.

Therefore, I have arrived at the conclusion that, notwithstanding the decision in *Trevor* v. *Whitworth* (1), it is possible to have an unlimited company so formed that withdrawals of

(1) 12 App. Cas. 409.

members may be made in accordance with the memorandum and articles of association, and that there would be no wrong to the creditors in giving effect to a memorandum of association and articles so drawn. By the very force of the terms it is plain, that in the case of an unlimited company the creditors know that there is no fixed capital, and, therefore, they have no right to complain, if I may use the term, of a reduction of that which has never been fixed in any way.

Taking the view that I do, the next matter that I have to deal with is the question whether the memorandum and articles of this society do provide for a withdrawal of members, and whether these members have availed themselves of those provisions and have withdrawn. In order to deal with that question, it is necessary to look at the terms of the memorandum and articles of association.

[His Lordship read clause 3, sub-clauses (*a*) and (*b*) of the memorandum, and art. 2, and continued as follows:—]

Now, I want to say, with regard to the provisions I have read, first, that it is perfectly plain, if you read the articles, that, later on, the word "subscription" is constantly used as including that which is described in art. 2 as "contributions," and, secondly, that it is perfectly manifest that the limit of £50 is a limit with which the creditors have nothing to do; it is only a limitation of the contributions which the members are to be called upon to make, as between themselves, while the company is a going concern. If the company goes into liquidation, the £50 limit must be left out of consideration altogether. It having been provided in the memorandum that loans may be made to members, and it having been provided in art. 2 that the contribution per share shall be 10*s*. per month and the shares £50 shares, one has to turn to art. 39 in order to ascertain how loans to members are to be made, and what their liability may be. I cannot help saying that these articles are drawn in a way which makes them extremely puzzling to construe. I do not think it would occur to any one reading the articles, although he might read them through several times, but that the loan, and the liability of the borrowing member in respect of the loan, were something wholly distinct from the liability of that same member in respect of

VAUGHAN WILLIAMS, J.

1893

In re BOROUGH COMMERCIAL AND BUILDING SOCIETY.

contributions for shares. One would have supposed that if some one had become a member, and had been paying his 10*s.* a month under art. 2, and presently it seemed to him that he would like to borrow a sum of money from the society, or if the loan of a sum of money was forced on him by the society under the provisions of art. 40 in default of his paying the fine necessary to exempt him from taking a loan, his liability to repay the loan, whether by a lump sum payment or by instalments, and the interest on that loan, was a liability wholly distinct and different from his liability to pay the 10*s.* a month per share in respect of his membership. But, although that is the notion that would be given even to a careful reader of these articles, yet, when one comes to analyse the terms of art. 39, I think that it is sufficiently clear that the intention was that the liability in respect of the 10*s.* per share, and the liability to repay the loan by instalments, should be treated as one and the same thing. The intention, according to my view, was, that if a member borrowed a sum of money, and, still more, if he became a member for the purpose of borrowing a sum of money, he should repay the loan by the payment of 10*s.* per share per month. The intention and the practice of this company were that every person should take up £50 shares to an amount equalling the total of the loan which he received. The intention and practice of the company are illustrated by the loan which was made to *Sellars & Wood.* They wanted £1200, and the only mode in which they could get the loan of £1200 was by taking up twenty-four £50 shares, and the intention and practice of everybody, and, according to my view, the true construction of these rules was, and is, that the loan so made should be repaid by paying the 10*s.* per share per month together with £5 per cent. interest. The words of art. 39, which make that clear, are these: "Any member wishing to receive an advance from the society shall apply to the committee, and state the security he proposes for the loan, and the committee shall decide whether the loan be made on the security offered, and shall cause all such inquiries and arrangements to be made, and do all things in and about the matter which they may think necessary. All loans shall bear interest at 5 per cent. per annum, such interest to be paid monthly along with the subscription"—I have already

said that if the articles are looked at it is perfectly plain that that word "subscription" means the same thing that "contributions" means in art. 2—"and in calculating such interest the monthly subscriptions"—and, according to my construction of these articles, it would be the same thing if the article had said "contributions"—"from time to time paid by the borrower, are not to be taken as reducing the amount of the loan." What is the meaning of saying that in calculating interest the monthly subscriptions from time to time paid by the borrower are not to be taken as reducing the amount of the loan? If it is expressly said that those contributions are not to be taken into consideration for the purpose of calculating the interest, it follows that the framer of the article meant that for other purposes those contributions are to be taken into consideration as reducing the amount of the loan; and really that construction of the article is the construction that this society has acted upon from first to last. You are to pay your contributions; you are to pay interest at 5 per cent. on the total amount of the loan; and the result will be that as soon as the eight and a half years have expired, if you have paid up all your contributions and all your interest, there will be nothing due from you at all. And one sees it in the case of Messrs. *Sellars & Wood.* They had to pay a certain sum every month; and if that amount is analysed, it will be found that a certain proportion of it is the contributions, and that the residue is the interest. It seems to me, therefore, perfectly plain that the payment of contributions and the repayment of the loan are dealt with by identical payments; that the payment that did the one did the other; that the payment that discharged one liability discharged the other liability; that the payments that freed the members from liability for the principal loan freed them from liability to pay the contributions under art. 2.

That being so, what is the meaning of these articles taken as a whole? It is said that, inasmuch as the £50 limit is only a limit affecting the members *inter se*, and not affecting outside creditors, the only effect of these payments was to discharge both the liability in respect of the principal of the loan and the liability in respect of the contributions on the £50 shares, and in no way

VAUGHAN WILLIAMS, J.

1893

In re BOROUGH COMMERCIAL AND BUILDING SOCIETY.

to affect the liability of the members, as shareholders, to outside creditors. I do not agree with that construction at all. I think that the plain and manifest intention of these articles is that, in respect of shares against which money has been borrowed, which have been taken up for the purpose of a loan, as soon as you have discharged the loan and the payments which are due, whether for interest or entrance fee or otherwise, in respect of the loan, your membership in respect of that share is intended to come to an end, and that the member *ipso facto* is treated as a member who has withdrawn in respect of those shares which he has thus fully paid up. That is the view I take of the meaning of these articles. It is the view also that those have taken who have been the officers of this company. It is perfectly obvious that as soon as ever a loan was paid off, not only did the society cease to require any payments whatever from the member—which may be accounted for, because as the £50 was paid off there would be no sum in respect of which a member could pay the 10*s.* a month, and, therefore, the inference to be drawn from the non-collection of the 10*s.* a month may be negatived by that consideration—but they ceased to send to these people the notices which they ordinarily would send, and are required to send, to members. It is quite plain that if the view now put forward by the liquidator were the accurate view, a member who had paid off his loan, and had ceased, perhaps, thereby to have any occasion to pay the 10*s.* a month, because there was nothing in respect of which he could pay the 10*s.* a month, would, nevertheless, have the deepest interest in knowing how this society was going on. He would have the deepest interest in seeing the yearly balance-sheet, and he would naturally, having regard to his own future possible liability, if he found the company was going wrong financially, take steps to get a resolution passed for immediate liquidation. But they do not so treat him; and I think, upon looking through these rules, that there is a great deal in them which justifies the view which the officers of the society took.

A great deal of argument was addressed to me upon art. 9. But this article has no application whatever to the withdrawal by a shareholder whose share or shares have been fully paid up. If a man has paid the full £50 which he is required by art. 2 to

contribute to the funds of the society, art. 9 has no application to his case whatever. Art. 9 deals with an indulgence to be given to those who have not fully paid their shares or share, and it says the committee may allow the withdrawal if they think fit—it is not a matter of right—and may return to him his subscriptions. I cannot help saying, in passing, that if *Trevor* v. *Whitworth* (1) applied, that article with regard to the return of the subscriptions would be *ultrà vires*. But I have no doubt myself, having regard to this society being an unlimited society, that there is nothing objectionable in the provision for the repayment of the subscriptions. The article provides that the committee may allow the withdrawal, and in that case, though not as a matter of right, the member withdrawing receives back his subscription, subject to certain deductions.

It follows, therefore, that art. 9 has no application to the withdrawal by a member who has fully paid his subscriptions. There is no other article which deals with withdrawals at all, and it would follow, therefore, that unless the construction which I have put upon art. 39 is the right construction, one would have this strange state of things, that members who are in default can withdraw, but members who are not in default cannot withdraw. I do not believe that was the intention of the article, and I believe that the reason why one finds no article corresponding to art. 9, in the case of shareholders who have fully paid up their £50 and the other moneys due from them, is that it was considered that the provisions of art. 39 were such that it was unnecessary to make any provision for the withdrawal of members who had so paid up all that was due from them.

It must be remembered that this is not a society which is formed for money profit. It is not a society which is formed for the purpose of the distribution of earnings. It is a society which is really formed for mutual advantages to the members, like many existing societies. In some societies the mutual advantages are in the shape of loans; in others they are appropriations for the building of houses; and I believe there are all sorts of societies of this kind—watch societies, apprenticeship societies, and other sorts. But they are none of them societies for the purpose of

(1) 12 App. Cas. 409.

VAUGHAN WILLIAMS, J.

1893

In re BOROUGH COMMERCIAL AND BUILDING SOCIETY.

earning a profit to be divided amongst the members, and, therefore, although it may be in some cases that at the end of the time which it is contemplated that the society will last there may be a profit to be divided amongst the shareholders, that is a mere accident. It is not the ultimate object of the society at all. The ultimate object of the society consists of the mutual advantages to be secured by the members; and when a member has had his share of the advantages, and paid to the full the contributions which could at any time become due as between himself and his brother members, it seems to me it is only consonant with those objects that the rules of the society should be so drawn that the person who has received his full benefit, and paid his full liability, should be allowed to withdraw, and be treated as having withdrawn.

Under these circumstances, I have come to the conclusion that the Respondents, who have fully paid up their shares, were intended by the rules of this society to cease to be members, as it was not considered that such persons had any longer any reason for continuing to be members. The object in this case is secured, the liability is discharged, and there is no possible reason why they should not cease to be members of the company, unless in some way or other their credit and their liability are pledged to the creditors. I have said that, although that would have been so in the case of a limited company, in my judgment the credit and liability of these members are in no way pledged to the public—at all events, in the case of a company with a memorandum of association and articles like those before me—and, therefore, I hold that neither of these members ought to be upon the list of contributories, and neither of them is liable to pay anything to the liquidator.

I think it is desirable that I should say, in case this matter goes further—and it is undoubtedly a matter of great importance, because there are so many societies of this description, and the true construction of articles of this sort will affect, I dare say, a great many of these societies—that, with regard to what happened about the action, I accept the account of Mr. *Wood*. I believe that, as far as the officers and solicitors of this society are concerned, the intention was that his connection with the society

should be put an end to by that payment, and that the payment was accepted, as far as they had the power to accept it, in full discharge of every liability which possibly could arise by virtue of his previous connection with the society as a borrowing member.

Solicitors: *Iliffe, Henley, & Sweet*, agents for *G. G. Fisher, Huddersfield; Ramsden, Radcliffe & Co.*, agents for *Ramsden, Sykes, & Ramsden, Huddersfield; Crossman & Prichard*, agents for *J. Sykes & Son, Huddersfield.*

F. E.

WRIGHT, J.

1893

Feb. 20, 21, 22.

In re DEXTER'S APPLICATION.
In re WILLS'S TRADE-MARKS.

Trade-mark—Registration—Similarity—Rectification of Register—Old Mark—Deceptive User—Misleading use of Words "Trade Mark."

D., a British cigar manufacturer, applied to register as a new mark for manufactured tobacco a label containing the words "*Star of Hope*" and a marine picture with a small six-pointed star in the sky. The application was opposed by *W.* as the registered proprietor of two marks for the same class of goods. The first mark was registered as an old mark in 1877, and consisted of an eight-pointed star. This mark was chiefly used upon packet tobacco; but from 1870 to 1884 cigars were manufactured for *W.* by an English firm, upon which the mark was used as part of a label containing the name of an imaginary Spanish firm and the word "*Habana.*" *W.'s* trade in cigars was comparatively small, and was subsidiary to his trade in packet tobacco. The second mark was registered in 1886 as a new mark, and consisted of a pictorial label, and by the side of the label an eight-pointed star, to which the words "*trade mark*" were attached. *W.'s* goods were frequently ordered by the public as "star" goods. *D.* moved to expunge *W.'s* marks:—

Held, first, that *W.* had no exclusive right to the name or design of a star, that, apart from such claim, *D.'s* mark was not calculated to deceive, and that *D.* was entitled to registration:

Held, also, that *W.'s* first mark was distinctive, and was not invalidated by the mode of user; first, because the misrepresentation accompanying the use of the mark upon cigars was not such as to destroy its distinctive character; secondly, because there had been no general or very extensive user of the mark upon cigars.

In re Wood's Trade-mark (1) distinguished.

Held, also, that *W.'s* second mark was misleading, by reason of the position of the words "*trade mark*," and ought to be expunged except as to the star, subject to an application being made by *W.* to amend.

ON the 9th of April, 1889, *R. J. Dexter*, who carried on business as a cigar manufacturer at *Nottingham*, applied for registration of a mark numbered 88965 as a new mark, in Class 45, for manufactured tobacco, including cigars. The mark consisted of a label containing a picture of the sea inclosed in a ring, and surmounted by the words "*Star of Hope*" in large characters. In the upper part of the picture, in the clouds, was a small six-

(1) 32 Ch. D. 262.

pointed star, and in the foreground below was an anchor, which was the most conspicuous feature of the picture.

This application was opposed by Messrs. *W. D. & H. O. Wills*, the well-known tobacco manufacturers of *Bristol* and *London*, as the proprietors of marks No. 5908 and No. 52425, registered in respect of the same class of goods.

Mark No. 5908 was registered in April, 1877, the application being made in May, 1876, as an old mark, for tobacco manufactured or unmanufactured, and the user claimed for it was sixteen years and a half before the date of registration. This mark consisted of an eight-pointed star, formed by two *Victoria* crosses.

Mark No. 52425 was registered in 1886 as a new mark for manufactured tobacco. It consisted of a pictorial label, in conjunction with a star like that previously registered. The main portion of the label was occupied by a picture of the head of a negro, inclosed by a circular band containing the words "*W. D. & H. O. Wills, Bristol.*" Underneath this picture was printed, in very large letters, the word "*Star.*" At the side of the label, on the right, was a representation of the eight-pointed star above referred to; and in immediate proximity to the star the words "*trade mark*" occurred.

Messrs. *Wills*, by their notice of opposition, claimed the exclusive right to the word "*Star*" and to the figure of a star in respect of tobacco, and asserted that their goods were frequently sold and ordered as "star" goods.

The Comptroller was of opinion that *Dexter's* mark was not so similar to either of Messrs. *Wills's* marks as to be calculated to deceive, and held that he was entitled to registration.

Messrs. *Wills* appealed from this decision.

Dexter thereupon moved to rectify the register by striking out Messrs. *Wills's* marks. The main grounds of the motion to rectify were, that at the respective dates of registration of Messrs. *Wills's* marks the word "*Star*" and the device of a star were common to the tobacco trade; that mark No. 5908 had been used by Messrs. *Wills* upon cigars, prior to the date of registration, in such a way as to induce the belief that the cigars were of Spanish manufacture, and had consequently lost its distinctive character;

WRIGHT, J.
1893
In re DEXTER'S APPLICATION.
In re WILLS'S TRADE-MARKS.

and that mark No. 52425 was misleading by reason of the position of the words "*trade mark*," which indicated that the device to which they were attached was alone the trade-mark.

The appeal and the motion now came on together. The evidence established that, at the date of registration of mark No. 5908, several tobacco manufacturers had publicly used marks of which the word "*Star*" or the device of a star formed part, and that many of such marks had been registered in Class 45. On the other hand, it was proved that Messrs. *Wills* had consistently claimed the exclusive right to the use of such word and device in connection with tobacco, and had been active in asserting their claim, and that in several instances their goods were ordered under the name of "star" goods.

It was further proved that from 1870 to 1884 Messrs. *B. Morris & Sons* had supplied some thousands of boxes of cigars to Messrs. *Wills*, and had, by direction of Messrs. *Wills*, placed thereon a label containing the name of a fictitious Spanish firm, "*Mandatos y Hijos*," which name was said to be intended as a Spanish equivalent for "*Wills & Sons*," and containing also a fictitious Spanish address. In the centre of the label was a large representation of the eight-pointed star which had been registered by Messrs. *Wills* in 1877. Over this star were printed in large characters the words "*Ne plus ultra*," and underneath was the word "*Habana*." The label did not contain the name of any English manufacturer.

In reference to this part of the case, one of the partners in the firm deposed that during the years in question their cigar trade formed a very small proportion of their total trade, and that they sold cigars merely because they found it a convenience to their travellers, when selling tobacco, to supply cigars to customers who wanted a few boxes. The star mark was chiefly used for packet tobacco. The average number of boxes sold by *Morris* to the firm was about 400 or 500 a year. The cigars were quoted in the price lists of Messrs. *Wills* as British manufactured goods, and the star was intended to shew that Messrs. *Wills* guaranteed the quality of the cigars. At that time it was the universal custom in the trade that British manufactured cigars should bear a Spanish label.

Warmington, Q.C., and *Hopkinson*, Q.C. (*A. Stanley Wills*, with them), for Messrs. *Wills*:—

In determining whether *Dexter's* application ought to succeed, regard must be had to the way in which Messrs. *Wills's* marks have been used. The public have come to associate Messrs. *Wills's* goods with the name and figure of a star, and their goods are spoken of as "star" goods. *Dexter's* goods will also be known as "star" goods, and the public will be deceived. There can be no reason why *Dexter* should choose a star for his mark or part of his mark unless his object is to get the benefit of *Wills's* trade. The Court ought, in the exercise of its discretion, to refuse the application: *Orr-Ewing & Co.* v. *Johnston* (1); *Eno* v. *Dunn* (2).

Aston, Q.C., and *Renshaw*, Q.C. (*Cutler* and *A. L. Morris*, with them), for *Dexter*:—

There is no evidence of deception. The marks are wholly dissimilar in appearance, and *Dexter's* goods will not be known as "star" goods, but as "star of hope" goods. Further, Messrs. *Wills's* marks ought to be expunged. The fact that they have been on the register for five years affords no protection if they ought never to have been registered.

[WRIGHT, J.:—My present opinion is, that Messrs. *Wills* are not entitled to the exclusive use of the word "*Star*," or the figure of a star; but it does not follow from that that their marks are not good marks.]

But their first mark is invalid on the ground that, before registration, it ceased to be distinctive of *Wills's* goods by reason of the fraudulent character of its user. The user of this mark by Messrs. *Wills* for cigars, not alone, but as part of a label containing the name of an imaginary firm and an imaginary address, was calculated to induce the public to believe that the goods were manufactured in *Spain*. Such misrepresentations confused the meaning of the star mark, and indicated that it was the mark of a Spanish firm, and therefore it cannot be

(1) 13 Ch. D. 434; 7 App. Cas. 219. (2) 15 App. Cas. 252.

WRIGHT, J.
1893
In re DEXTER'S APPLICATION.
In re WILLS'S TRADE-MARKS.

protected: *In re Wood's Trade-mark* (1); *Newman* v. *Pinto* (2); *In re Fuente's Trade-mark* (3).

The objection to their second mark is that the words "*trade mark*" are in such a position as to make it appear that the star only and not the label is protected, and consequently the mark is calculated to mislead the public. That objection is fatal to the validity of the mark: *In re Apollinaris Company's Trade-marks* (4).

Hopkinson, Q.C., *contrà*:—

The user of the first mark on cigars was a very small part of the total user. Moreover, the mark was intended to indicate that the goods were sold or guaranteed by *Wills*, which was true, and the fact that its user was accompanied by misrepresentations is not necessarily fatal to its validity.

As regards the second mark, the *Apollinaris Case* is distinguishable, because in that case there was nothing distinctive in the label except the device to which the words "*trade mark*" were attached.

Aston, in reply, on the motion to rectify.

WRIGHT, J.:—

In this case the Comptroller-General has allowed *Dexter's* application to be registered for a trade-mark, which may be called the "*Star of Hope*" mark for tobacco, and the only question on that part of the case is whether the decision of the Comptroller ought to be interfered with. I think it ought not. The real question is whether *Dexter's* trade-mark is calculated to deceive the public into thinking that they are buying Messrs. *Wills's* goods when they are really buying *Dexter's*. I think it is not calculated to deceive the public unless Messrs. *Wills* have a monopoly of the name "*Star*," and of the figure of a star, and can claim that monopoly as to stars of every kind. No specific evidence has been brought forward to shew that *Dexter's* intended trade-mark bears such a resemblance to either of *Wills's* trade-

(1) 32 Ch. D. 262.
(2) 4 Rep. Pat. Cas. 508.
(3) [1891] 2 Ch. 166; 8 Rep. Pat. Cas. 214.
(4) [1891] 2 Ch. 186, 233.

marks that on that special ground, and apart from the use of the word "*Star*," or the figure of a star, the public would be deceived. It rests therefore upon this: that Messrs. *Wills* have always claimed, and continue to claim as far as they can, the exclusive right of using the word "*Star*" and the figure of a star in relation to the sale of tobacco. To my mind that claim is clearly too wide, and, quite apart from the evidence in this case, I should have thought that the word "star" was one of those few words of universal use which could hardly be appropriated by any one of mankind; that it must be a part of the common stock-in-trade for naming articles, and especially for naming them with a view to praise them. But, on the evidence, I think it is clear that there were many firms—certainly three—who in 1876 were the registered proprietors of marks containing the device of a star in some form, or the word "star" in some form, and had used such marks ever since, with very little interruption on the part of Messrs. *Wills*, though I lay no stress on that, because, no doubt, whenever Messrs. *Wills* thought they saw a chance of stopping the use of a star they tried to do it. I think that the use of the word "star" and the use of the figure of a star are matters *publici juris*, and have been *publici juris* at all material times, except so far as some particular trader may have appropriated a particular phrase in which the word "star" is used in some special manner, or may have appropriated a particular design in which the figure of a star has assumed a special form, or has been so combined with other matters as to produce a specific thing, different from what may be called the ordinary image of a star. I think there is an instance of that in the books, where iron was described by a word of five or six small capital letters with a small asterisk over the corner of the last letter of the word, and it was held in an English Court that somebody who used in relation to the same material—namely, iron—a somewhat similar name in very small letters, though a different name, with an asterisk in the same position, had done wrong in relation to the use of that star. That may be. There the star was in a particular position in relation to a particular letter, and made specific. So, in *Orr-Ewing & Co.* v. *Johnston* (1), where it was held

(1) 13 Ch. D. 434; 7 App. Cas. 219.

WRIGHT, J.
1893
In re DEXTER'S APPLICATION.
In re WILLS'S TRADE-MARKS.

that if the public had come to associate a particular design with a particular person's manufacture there would be a right to protect that design on the part of that particular manufacturer. There the design was a very peculiar one—the two elephants. I do not say that the legend "seven stars" might not be appropriated. Very likely it might; or the legend "thirteen stars." I should think probably it could; and if one adopted any very specific number of stars, I should think no doubt it could be appropriated; but here Messrs. *Wills* are claiming to appropriate the word "*Star*" in the widest sense of the term, and that will not do. Therefore, in my opinion, the decision of the Comptroller was right. I do not think that the Comptroller was bound to refuse the registration merely because some person or many persons might be misled into thinking *Dexter's* tobacco was *Wills's* tobacco, if the grounds on which they were misled were grounds on which Messrs. *Wills* had no right to protect themselves—that is to say, if they were misled merely because a multitude of persons had by habit, and without any reason, associated the word "star" with the name of *Wills*. I think there must be something approximating to a right to use the word "star" to enable them to complain on that ground.

Then Mr. *Dexter*, being attacked, sprung a counter-mine on Messrs. *Wills*, and applied to rectify the register by striking out Messrs. *Wills's* trade-marks. Messrs. *Wills's* principal trade-mark is No. 5908, and I see no reason whatever to think it is otherwise than a perfectly good trade-mark. In that stars generally are not claimed, neither the name "star" nor every form of star. What is claimed is one extremely distinctive and definite form of star, which has a peculiar property of catching the eye—and which all the witnesses say does catch the eye—effectually, so that they can detect it at once. It is far more definite to my eyes than any of the many varieties of stars which I have seen in this case. I see no reason at all why that trade-mark should not be recognised as perfectly good; it has been on the register from 1876, and it has been acted upon all that time; and I for one should think it highly wrong to interfere with what has been the foundation of an enormous trade—and rights of a most serious kind—without very strong grounds for doing

so. I not only do not see any strong grounds, but I see no grounds at all, except on the one point I will refer to presently, namely, the point founded on the case of *In re Wood's Trade-mark* (1).

This mark is impeached on the ground that Messrs. *Wills*, who had used the same mark for many years before registering it in 1876, had so used it during that period that it had lost its distinctive character as indicating tobacco of Messrs. *Wills's* manufacture. That part of the case, I confess, gives me considerable anxiety—I feel the force of Mr. *Aston's* objection; but at the same time, I think I ought not to give way to it. I think, as a matter of common sense, one must look at the substance of the thing. As regards the bulk of Messrs. *Wills's* trade, the objection does not apply at all. It only applies to the cigars, which were quite incidental to their main trade, and formed comparatively a very small portion of it, though, no doubt substantial to some extent in itself—400 or 500 boxes a year for some years. But the ground I really go upon is this: I do not think the doctrine of *In re Wood's Trade-mark* applies where it may be fairly said that the person using the trade-mark has not made a substantial misrepresentation as to the property or goods which it covers. Now here I think, as to the cigars, Messrs. *Wills* did not represent that they were of their manufacture at all. They represented exactly the contrary, and represented that they were of *Havana* manufacture. That is a kind of deception which was very common in those days, and for which nobody was blamed in those days, and it has now been dealt with by Acts of Parliament. I think that Messrs. *Wills* by using their "*Star*" upon the "*Ne plus ultra*" mark, simply represented that they sold those cigars, and that those cigars passed through their hands, thereby involving some kind of guarantee of quality. If that is all they did by the mark, then it is not within the doctrine of *In re Wood's Trade-mark* at all. In *In re Wood's Trade-mark* it was held that the person who had registered his trade-mark had, before registering it, so used it that he had represented that goods marked with his trade-mark were those of other persons than himself. Here there is no such representation at all. The only

(1) 32 Ch. D. 262.

WRIGHT, J.

1893

In re DEXTER'S APPLICATION.

In re WILLS'S TRADE-MARKS.

representation that is made by the "*Star*" is that they are sold by Messrs. *Wills*, and that is a true representation. Therefore, I am not pressed with the case of *In re Wood's Trade-mark* (1). To follow the words of Lord Justice *Fry*, Did they represent the "*Star*" to be applicable to the product of a manufacturer other than themselves, so as to produce the belief that the goods were the manufacture of that other person? I think not. If they did, they could not say that the "*Star*" was distinctive of their own manufacture. But they do not say that the "*Star*" is distinctive of their own manufacture as regards those cigars; they only say that it is distinctive of their own sale. I think, also, I ought to come to the same conclusion in regard to the doctrine of *In re Wood's Trade-mark*, on the ground that there was no general or very extensive user of Messrs. *Wills's* star mark in relation to cigars. On these grounds I think I am entitled to decide in their favour, as I certainly should incline to do in a case of a trade-mark which has been used so long and so generally as this one, and which has never been challenged.

Then I come to the trade-mark with the negro and the star by the side, No. 52,425. I confess I yield to Mr. *Renshaw's* objection to that. I think it is within the difficulty raised in *In re Apollinaris Company's Trade-marks* (2), and, so far as concerns the device of the negro and the word "*Star*" thereunder, I think that that trade-mark is misleading, and ought to be expunged, of course leaving the original star in Messrs. *Wills's* possession.

There will be an order expunging this mark from the register, unless an application to amend is made within a reasonable time.

Solicitors: *McKenna & Co.; Salaman.*

(1) 32 Ch. D. 262. (2) [1891] 2 Ch. 213.

H. B. H.

LOCK *v.* PEARCE.

C. A.
1893
March 21.

[1891 L. 2856.]

Lease—Forfeiture—Breach of Covenant—Notice—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-s.* 1, 2.

A notice under sect. 14, sub-sect. 1, of the *Conveyancing and Law of Property Act*, 1881, requiring the lessee to remedy a breach of covenant, may be good, though it does not require payment of compensation in money.

North London Land Company v. *Jacques* (1) disapproved.

An application by a lessee under sect. 14, sub-sect. 2, of the same Act must be made in an action commenced by writ, and cannot be made by originating summons.

The decision of *North*, J., affirmed.

THIS was an appeal from a decision of Mr. Justice *North* (2).

The facts are fully given in the previous report. The following short statement will be sufficient for the purpose of the present report.

The Plaintiffs were the owners as mortgagor and mortgagee of seven leasehold houses in *South Tottenham* let to weekly tenants. The Defendant, *Arthur Pearce*, was the lessor of the premises.

On the 2nd of June, 1891, the Defendant, by his solicitors, served written notices on the Plaintiffs, by leaving them at the several houses, that they had not sufficiently repaired the houses in pursuance of the covenants contained in the leases thereof, and requiring them to remedy the breaches of covenants by doing the works specified in the schedule annexed to the notices. The notices concluded as follows: "And as such solicitors and agents as aforesaid, we also require you to forthwith pay to the said *Arthur Pearce* the sum of £2 2*s.* for the expenses which have been incurred by the said *Arthur Pearce* for surveyor's fees and solicitor's charges by reason of such breaches of covenants as aforesaid; and we hereby give you further notice that if you make default in remedying such breaches of covenants in manner above mentioned, or in making the compensation hereby required, the said *A. Pearce* will enter and take possession of the

(1) 32 W. R. 283. (2) [1892] 2 Ch. 328.

C. A.
1893
LOCK
v.
PEARCE.

said messuage dwelling-house and premises, but without prejudice to any other remedies which he may have by reason of such default." A schedule of work to be done was appended to the notices.

After the expiration of three months from the date of the notices, the Defendant commenced actions in the *Edmonton* County Court against the tenants in occupation for the recovery of the houses, to which the present Plaintiffs were not made parties, although an opportunity was offered to them of being added as defendants; and on the 25th of November, 1891, the county court judge made orders on the tenants for delivery of possession to the Defendant. On the same day, the Plaintiffs took out an originating summons in the Chancery Division asking a declaration that no forfeiture had taken place; or, in the alternative, relief against the Defendant's right of re-entry and forfeiture upon such terms as the Court should think fit; and an injunction to restrain the Defendant from proceeding on the judgments in the county court to take possession. The summons was returnable on the 10th of December, 1891. On the 9th of December, the Defendant obtained possession of the houses under the county court judgments.

Mr. Justice *North* held that the notices on which the proceedings in the county court were carried on were good notices under sect. 14, sub-sect. 1, of the *Conveyancing and Law of Property Act*, 1881, and that the judgments were valid. And he decided that on the merits the Plaintiffs had shewn no grounds for relief under the Act.

The Plaintiffs appealed from this decision.

Pitt-Lewis, Q.C., and *Oswald*, for the Appellants:—

The proceedings in the county court were invalid because the notices on which they were founded were bad. They did not comply with the provisions of sect. 14, sub-sect 1, of the *Conveyancing Act*, 1881, inasmuch as they did not claim compensation in money for the breach of the covenants. It has been decided that this is necessary by *Bacon*, V.C., in *North London Land Company* v. *Jacques* (1), which is reported in a subsequent stage in

(1) 32 W. R. 283.

Jacques v. *Harrison* (1), and that decision was followed by Lord Justice *Bowen* in *Greenfield* v. *Hanson* (2). It is true that the notices asked for £2 2*s.* for the surveyor's and solicitor's charges; but that claim was illegal, as was held in *Skinners' Company* v. *Knight* (3), and must, therefore, be left out of consideration. The lessor ought to give the lessee the option either of remedying the breach or of paying compensation, and if he does either the forfeiture cannot be enforced. "And" in the subsection may be read "or."

The present Plaintiffs were not parties to the actions or they would have produced evidence shewing that the property was really in a fair state of repair. That evidence has now been given before the High Court, and we contend that it establishes that there has been no breach of the covenants, or, if there has, that it has been remedied, and that there was good ground for relief: *Proudfoot* v. *Hart* (4); *In re Anderton and Milner's Contract* (5).

With respect to the technical objection that the present procedure ought to have been commenced by writ and not by an originating summons, the words used in the Act, sect. 14, subsect. 2, are: "the lessee may in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief;" and by sect. 69 proceedings for relief must be in the Chancery Division, and application must be made in Chambers. In this case the lessees could not make the application in the lessor's actions because they were in the county court, and they were right in applying by summons in the Chancery Division. An originating summons is an action within the 100th section of the *Judicature Act* and the Rules: *In re Fawsitt* (6). In *Rogers* v. *Rice* (7) the application for relief was made by originating summons, and no objection was taken on that ground.

Upjohn, for the Respondent:—

The real object of this proceeding is not relief against the forfeiture, for which they are too late, possession having been already taken: *Quilter* v. *Mapleson* (8); *Rogers* v. *Rice*; but to set

(1) 12 Q. B. D. 136.
(2) 2 Times L. R. 876.
(3) [1891] 2 Q. B. 542.
(4) 25 Q. B. D. 42.
(5) 45 Ch. D. 476.
(6) 30 Ch. D. 231.
(7) [1892] 2 Ch. 170.
(8) 9 Q. B. D. 672.

C. A.
1893
LOCK
v.
PEARCE.

aside the judgments of the county court. They ought to have appeared in the actions in the county court and produced their evidence there. They are now bound by the judgments, and cannot say that there has been no forfeiture. The notices were perfectly good. It is not required that the lessor should claim compensation unless he wants it. Such a construction of the section would be unreasonable: *Skinners' Company* v. *Knight* (1). The decision of *Bacon*, V.C., in *North London Land Company* v. *Jacques* (2), which was followed by Lord Justice *Bowen* in *Greenfield* v. *Hanson* (3), is not binding on this Court. The present application is not authorized by sect. 14, sub-sect. 2. The application must be "in an action," not by an originating summons. In *Rogers* v. *Rice* (4) the point was not considered.

Pitt-Lewis, in reply.

LORD ESHER, M.R.:—

I am of opinion that this appeal must be dismissed, and that every point which has been raised on the part of the Appellants must be decided against them.

The first point is as to the jurisdiction of Mr. Justice *North* to enter upon the question at all, and that raises this point, whether the application could be made on an originating summons. Now, what the Judge was asked for was relief under sub-sect. 2 of sect. 14 of the *Conveyancing Act*, 1881. Under what circumstances can he entertain that question? He can only entertain it "where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture." The first impression, therefore, is that it can only be brought before him whilst the lessor is proceeding to enforce the right of re-entry or forfeiture. If the re-entry has been made, then it is too late; he could not bring himself within the terms of that section. But when the lessor is proceeding (I assume that the entry is not complete), the lessee may "in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief."

The action of ejectment brought by Mr. *Pearce*, the lessor,

(1) [1891] 2 Q. B. 542.
(2) 32 W. R. 283.
(3) 2 Times L. R. 876.
(4) [1892] 2 Ch. 170.

was brought in the county court, and the lessee therefore could not apply to the High Court in the lessor's action, because that action was in the county court. Therefore he was left by the circumstances of his case to make his application in an action by himself. He did not, however, bring an action; he applied to the Court on an originating summons, without there being any action at all. An originating summons is not an action; therefore there was no action. The originating summons cannot be said to be a summons taken out in an action under these circumstances, and Mr. Justice *North* had no jurisdiction to hear the case; and, as I gather, that was Mr. Justice *North's* own opinion; therefore, so far, we are not differing from him.

But, supposing that there was jurisdiction, then the question is, under what circumstances can this relief be asked for? It can only be asked for where the lessor is proceeding to enforce a forfeiture. Here there had been a judgment in the county court, but possession was not taken when the summons was taken out; therefore he was asking for relief against the forfeiture. It seems to me that under these circumstances he cannot say that there is no forfeiture. His asking for relief against forfeiture is an admission that there is a forfeiture. Therefore, if Mr. Justice *North* had had jurisdiction in this case, he could not have had jurisdiction to say that the judgment of the county court was not a valid judgment. He could not sit by way of appeal against the county court judge's judgment. He must take the fact as established that there is a judgment and an ejectment.

But there is another point relied on by the lessees which we must consider. They say that if the Court could inquire whether there was properly a forfeiture—that is, whether the judgment in the county court action was a right one—they can shew that the judgment was wrong, because the notice mentioned in sect. 14, sub-sect. 1, was not given: in other words, that the notice which was given was not a valid one. Now in this notice the lessor did complain of a breach of the covenant to repair, which is capable of a remedy. Where there is a breach which is capable of a remedy, this section requires that the lessor should in the notice require the lessee to remedy that breach; and he cannot, if it is a breach which can be remedied, pass that by, and

C. A.
1893
LOCK
v.
PEARCE.
Lord Esher, M.R.

not give notice that he requires it to be remedied. When asking for compensation in money for a breach which can be remedied, he is bound in the notice to require the lessee to remedy the breach. In the present case the lessor did require the lessee to remedy the breach, which was a breach capable of being remedied. Then there comes the question whether in any case he is to require the lessee to make compensation in money for the breach. If he is bound, where the breach is capable of being remedied by the lessee, to require him to remedy the breach, it is impossible to suppose, or to hold, that he must ask for compensation in money as well as for the breach to be remedied. It is not compensation for the expenses of doing the repairs; it must be for something more than that. This is shewn by the rest of the section: for if "the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach," the forfeiture will be enforceable. It has been strongly argued that "and" in this sentence ought to be read "or." I see no ground upon which the Court can properly read "and" here as "or"; although, of course, if there is a breach, the lessor is entitled to compensation in money instead of allowing the lessee to remedy the breach. Therefore it seems to me that the meaning of the section is that the breach must be remedied if it can be, and there must be compensation besides that, if there is anything for which to compensate. I go further, and say that the lessor need not, if he does not want any compensation, ask for it. If he does not want compensation, why should he ask for what he does not want? The effect of his not asking for it, to my mind, is that if he obtains an order in an action of ejectment, requiring the lessee to remedy the breach, he cannot subsequently ask for any further compensation. That seems to me the proper meaning of the section. If the case before Vice-Chancellor *Bacon* (*North London Land Company* v. *Jacques* (1)) decides otherwise, I do not agree with it. In the case before Lord Justice *Bowen* (*Greenfield* v. *Hanson* (2)), I am sure he did nothing but what any Judge acting upon a well-known rule, and sitting in a Court of co-ordinate jurisdiction,

(1) 32 W. R. 283. (2) 2 Times L. R. 876.

feels bound to do—that is, he adopted what was held to be the construction of the statute; but when I come to construe the language of the statute, I differ from Vice-Chancellor *Bacon*, and the case in the Queen's Bench Division carries the matter no further. When we are in this Court, we are not bound by it; and I say that, notwithstanding any such decision, the construction of that section is what I have stated. Therefore, I am of opinion that in this case, if the actions in the county court are inquired into, they were properly brought, and the judge of that court was right.

Then, if the next point could be considered by Mr. Justice *North*, there was nothing to prevent him from giving relief or not, as he might think right according to the merits of the case. Upon the merits of the case he has found that the repairs were not done, and that these premises were all out of repair. With regard to that, we cannot differ from him. I think the evidence shews that the lessees persisted, and, as Mr. Justice *North* found, obstinately persisted, in doing nothing to these premises until the last moment, when, in order to save themselves from forfeiture, they patched up the repairs which they had so long neglected. I think that was a valid ground, on which Mr. Justice *North* was entitled to exercise his discretion. On all these grounds, I am of opinion that the appeal must be dismissed with costs.

LINDLEY, L.J.:—

I am of the same opinion. I think the Appellants are wrong, both on the merits and on the procedure. I will deal with the merits first. The case stands in this way. The lessor brought actions in the county court against his tenants to recover possession of this property: and the lessees declined to put themselves in a position to defend those actions. They would have nothing to do with them. Why, I do not know and do not stop to consider. There were means in the practice of the county court by which they might have put themselves in a position technically to defend the actions, if they had chosen to do so, and to have called evidence, which they now say ought to have been produced before the county court judge. But they

C. A.
1893
LOCK
v.
PEARCE.
Lindley, L.J.

did nothing whatever. The county court judge therefore decided on the only evidence which was before him, and came to a conclusion on that evidence that this property was in a bad state of repair, and that the Plaintiff *Pearce* was entitled to recover possession from the persons before him as defendants. Then the present Applicants, as we may call them, take out a summons the like of which I never saw before. It is what is technically called an originating summons, asking, first, for a declaration that there was no forfeiture in fact, by reason of the breach of covenant to repair the premises. I will pause there to ask if any Chancery practitioner ever heard of such a thing? Obviously not. Their right was to proceed by an action commenced by writ. An originating summons is a process introduced in order to save costs, and is not applicable to such a case as this at all. Then the summons proceeds to ask "in the alternative for an order for relief against the said Defendant's right of re-entry and forfeiture upon such terms as to the Court may seem fit." Whether that relief can be given them depends upon the true construction of the section. Then the summons goes on to ask for an injunction by way of prohibition or otherwise restraining all further proceedings upon the judgments in the actions of ejectment in the county court, on the ground, among other things, of want of jurisdiction in the judge of that court. Who ever heard of such a prayer in an originating summons? For such a purpose an originating summons is utterly inappropriate. Whether it is equally inappropriate to obtain relief under sect. 14 of the *Conveyancing Act*, 1881, will have to be considered. Mr. Justice *North* evidently doubted whether he had jurisdiction to grant relief on an originating summons, and we have reason to believe that he thinks he had not. I quite agree in this, for this reason, that the relief is to be obtained in the mode and at the time prescribed in sect. 14, sub-sect. 2, which says, "where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief." The Appellants say that an application by originating summons is an application by a summons in an action. In what action? The Court referred to in sect. 14 is the High Court,

and not a county court. Then, again, the Division of the High Court in which the lessee is to bring his action is the Chancery Division; and a particular application is to be by summons; all of which is consistent with an action in the High Court and in the Chancery Division. In that action you can apply for a summons; but I cannot read this clause in sect. 14 as authorizing an application for relief by an originating summons, which is not a summons in any action. This point is not purely a technical one. In some cases, as in the case of a lessor resident abroad, the inconvenience of proceeding by an originating summons would be far-reaching. Therefore it appears to me that this summons is misconceived.

With respect to the question of forfeiture, there can be no doubt that there has been a very serious forfeiture. My own conclusion from the affidavits is that the premises were terribly out of repair, but that when the lessor took steps seriously to recover possession efforts were made more or less to put them in repair. I think Mr. Justice *North* was right when he said that up to a certain point there had been the grossest neglect to keep the property in decent repair; but I think that an effort was made at last to do something to put it in a little better order.

Then, as regards the notices required by sect. 14, sub-sect. 1, the statute requires notice to be given specifying the breach complained of, as the first thing, and, if the breach is capable of remedy, requiring the lessee to remedy it, and "in any case requiring the lessee to make compensation in money for the breach." Supposing the lessor does not want compensation, is the notice to be held bad because he does not ask for it? There is no sense in that. The meaning is to be found by looking a little further on. The sub-section begins by saying that the right of re-entry or forfeiture shall not be enforceable unless proper notice is given and the lessee fails within a reasonable time afterwards to remedy the breach and to make reasonable compensation in money to the satisfaction of the lessor. The sense of that is that the lessor must tell the lessee what he wants done. The lessee is entitled to know what his landlord complains of, and, if his landlord is entitled to compensation,

C. A.
1893
LOCK
v.
PEARCE.
Lindley, L.J.

whether he wants compensation. Supposing in the case of fire insurance the lessee had discontinued insuring, and no injury had happened, there would be no damage, and there could be no compensation. In that case there could be no sense in asking for compensation. The true construction of the clause is not that in any case the tenant shall make compensation, but that, as in *Skinners' Company* v. *Knight* (1), the lessor shall give notice what he requires of the lessee. In the present case the notice did tell the tenant that the landlord required certain repairs to be done, and that he wanted certain compensation. It is true that he asked for £2 2*s.* for the surveyor's fees, and there is a case which decides that he could not recover them; but in fact he told them what compensation he wanted. The notices are as good as any notice could possibly be.

On these grounds I am of opinion that this appeal fails. Upon the merits as well as upon the technicalities, all the points are against the Appellants.

KAY, L.J.:—

I am entirely of the same opinion, and have nothing to add.

Solicitors: *T. Noton; Pearce & Sons.*

M. W.

C. A.
1893
March 23.

In re TARN.

[1891 T. 1076.]

Appeal—Interpleader—Decision in a summary way—Common Law Procedure Act, 1860 (23 & 24 *Vict. c.* 126), *s.* 17—*Rules of Supreme Court*, 1883, *Order* LVII., *rr.* 8, 9, 11.

Where in interpleader proceedings a Judge decides a question under Order LVII., rule 9, without directing an issue or stating a special case, his decision is a summary decision within the meaning of the *Common Law Procedure Act*, 1860, s. 17, and is not subject to appeal.

THIS was an appeal from an order of Mr. Justice *Kekewich* in Chambers.

In February, 1893, the sheriff of the county of *London*

(1) [1891] 2 Q. B. 542.

seized, on a writ of *fi. fa.* issued under a judgment obtained against *W. F. Tarn*, certain furniture and goods at *Tarn's* residence.

Notice having been given to the sheriff that the property was claimed by the trustees of an ante-nuptial settlement, dated the 15th of September, 1875, made on the marriage of *W. F. Tarn*, the sheriff, on the 14th of February, 1893, took out an interpleader summons to have the title to the property determined.

By the settlement in question *Tarn* covenanted that he would within seven days after the solemnization of the marriage pay to the trustees £1000, which was to be held by them in trust to invest it, and during the joint lives of the husband and wife pay the income to the wife for her separate use without power of anticipation, and after the death of either of them to the survivor for life, and after the death of the survivor upon trusts for the issue of the marriage. By the same deed *Tarn* assigned to the trustees two policies of assurance on his own life for £500 each, the moneys arising from which were to be held on the same trusts as the £1000.

By a further witnessing part the intended husband and wife, according to their respective rights and interests, and to the intent that the deed might pass by way of legal assignment the articles of household furniture and effects then in a certain messuage therein mentioned, and might pass by way of legal assignment such of the articles thereinafter expressed to be thereby assigned as were then the property of the parties or either of them, and might bind by way of contract the right of property in such articles as were not then but should thereafter become the property of the intended husband and wife or either of them, did and each of them did assign to the trustees all the furniture, plate . . . and articles of household use or ornament then belonging to the intended husband and wife or either of them, or which at any time previously to the marriage or during the coverture should belong to them or either of them, upon trust after the marriage to allow the wife to have the sole and separate use thereof during the joint lives of husband and wife, and after the death of the one first dying upon trust for the survivor of

C. A.
1893
In re
TARN.

them absolutely. And it was agreed that the husband and wife might sell, exchange, or dispose of any such effects and articles, and dispose of the proceeds in any manner they might think fit, without any liability being thereby incurred by them or either of them to replace the articles sold or the proceeds.

Mr. Justice *Kekewich* decided that the trustees could not establish their claim to the goods as against the execution creditor, on the ground, as it was stated, of the above provision that the husband and wife might dispose of the goods as they pleased without any liability to replace them, which his Lordship considered to shew that the deed was made to defeat or delay creditors. The trustees appealed, and Mr. Justice *Kekewich* gave his certificate that he did not require any further argument.

Buckley, Q.C., and *Sargant*, for the Respondent:—

We take the preliminary objection that the order is not appealable. The effect of a decision in Chambers upon an interpleader summons depends on Order LVII., rules 8, 9, 11, and the *Common Law Procedure Act*, 1860, s. 17, which is still in force, though nearly all the other provisions of the Act have been repealed. Under that section the decision of the Judge "in a summary manner" is final: *Waterhouse* v. *Gilbert* (1); *Lyon* v. *Morris* (2); *Bryant* v. *Reading* (3).

[LINDLEY, L.J.:—In rule 11, are not decisions "in a summary way" confined to decisions under rule 8? If the order was made under rule 8, I think you are right, *Lyon* v. *Morris* and *Bryant* v. *Reading* being in point; but it appears to me that the order now under appeal must have been made under rule 9. *Dodds* v. *Shepherd* (4) was similar to those cases, for the order had been made under sect. 14 of the Act, which is substantially the same as rule 8.]

Sect. 17 applies to orders made in a summary way under sect. 14, which corresponds to rule 8, or under sect. 15, which corresponds to rule 9, and the General Orders were intended not

(1) 15 Q. B. D. 569.
(2) 19 Q. B. D. 139.
(3) 17 Q. B. D. 128.
(4) 1 Ex. D. 75.

to alter the statutory practice, but to embody it: *Dawson* v. *Fox* (1).

Crackanthorpe, Q.C., and *F. Dodd*, for the Appellants:—

By rule 11 we have an appeal if the order was made under rule 9. Rule 11 makes a marked distinction between orders under rule 8, which it labels as summary, and other orders. The cases cited against us turned on rule 8; and in the present case the order can only have been made under rule 9, for there was neither consent of both claimants nor request by one claimant so as to bring the case within rule 8.

LORD ESHER, M.R.:—

As I understand the decisions of the Court of Appeal, they are to the effect that under the provisions of the *Common Law Procedure Act*, 1860, before the *Judicature Acts* and the rules made under them, every decision of a judge in an interpleader matter in Chambers or otherwise, where he did not direct an issue or a special case, was a summary decision, and no appeal would lie from what he had thus decided. If instead of deciding the matter summarily he directed an issue, that issue would be tried by a judge and jury, and if anything went wrong at the trial the ordinary rules as to setting right any miscarriage at a trial would apply. If he directed a special case the ordinary practice as to special cases applied. It has been held by the Court of Appeal that this was the state of things before the rules under the *Judicature Acts*. Have those rules made any alteration? As I understand the decisions they come to this, that looking at the rules altogether they were not intended to make and have not made any alteration as to interpleader proceedings. Where, therefore, under the *Common Law Procedure Act*, 1860, there was no appeal, the rules do not give a right of appeal. Here Mr. Justice *Kekewich* has not directed an issue nor stated a case, but has at once decided the case. His decision, therefore, is a summary decision—no appeal from it will lie. The appeal, therefore, must be dismissed.

(1) 14 Q. B. D. 377.

C. A.
1893
In re TARN.

LINDLEY, L.J.:—

I am of the same opinion, though I feel some difficulty in the case. I was at first disposed to think that an order made under rule 9 was appealable, since sect. 11 provides that an order made in a summary way under rule 8 shall be final, but does not say so as to orders made under rule 9. But rule 11 is preceded by the words "except where otherwise provided by statute." Now, under the *Common Law Procedure Act*, 1860, the practice was uniform; there was no appeal from an order made summarily under sect. 14 or sect. 15, which correspond to rules 8 and 9 of Order LVII. Rule 11 is difficult to work out in practice; but the introductory words make the rule not applicable where it would be inconsistent with any statutory provisions as to the finality of an order. We have then to look out of the rules into the statutes; and when we look at the statutes we find that an order made summarily by a judge in interpleader proceedings is not appealable.

Solicitors for Appellants: *Birchalls.*
Solicitors for Respondent: *Loughborough & Gedge.*

H. C. J.

C. A.
1893
NORTH, J.
Jan. 13.
C. A.
March 27, 28.

In re FRAPE.
Ex parte PERRETT.

[1892 F. 1147.]

Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *s.* 8, *sub-ss.* 2, 4—*Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 41—*Costs—Agreement—Signature—Payment—Impeachment of Agreement for Unfairness.*

An agreement between solicitor and client is a good agreement under sect. 8 of the *Solicitors' Remuneration Act*, 1881, if signed by the person to be bound thereby, although it is not signed by the other party.

In order to impeach an agreement between solicitor and client as unfair and unreasonable under sect. 8, sub-sect. 4, of the Act, it is not necessary that an action should have been brought to set it aside, or a previous order for taxation obtained; but, on a summons for taxation, if the evidence shews that there has been such an agreement and that there are grounds for suspicion of unfairness, the Court will order the Taxing Master in taxing

the bill of costs to consider whether the agreement was fair and reasonable.

The words "By agreed costs £80" in such an agreement *held* to be a sufficient description of all the costs incurred up to the date of the agreement.

Per North, J.:—The written name of a solicitor in the heading of an account made out by his clerk does not amount to the signature of the solicitor to an agreement contained in the account.

In re Palmer (1) considered.

THIS was a summons for the taxation of ten bills of costs, delivered by Mr. *Frape*, a solicitor, to Mr. *Perrett*, his client. The solicitor had been employed by the client in respect of business connected with a house called *Amport House*. The business was connected with mortgages, attempted sales, and an ultimate sale. The purchase-money was paid to the solicitor. He paid off the mortgages, and paid to his client Mr. *Perrett* the sum of £43 4*s*. 6*d*. as the balance due according to an account rendered. The account was in the handwriting of a clerk of Mr. *Frape's*; it was headed, "Mr. *Frederick Perrett*, senior, in account with *H. D. Frape*." On the left-hand side were various items of payment by Mr. *Frape* to or on account of Mr. *Perrett*, amounting in all to £334 13*s*. 10*d*. On the right-hand side were items of receipt by Mr. *Frape*, on behalf of Mr. *Perrett*, in respect of deposit and balance of purchase-money, amounting in all to £457 18*s*. 4*d*. There was no reference in the account to the property in respect of which the purchase-money was paid. The lower part of the right-hand side of the account was as follows:—

	£	s.	d.
	457	18	4
"Deduct from other side	334	13	10
	123	4	6
By agreed costs	80	0	0
Balance due to you	43	4	6

"Received this 23rd day of February, 1892, of Mr. *H. D. Frape*, the sum of £43 4*s*. 6*d*. in settlement of above account, to which I hereby agree." The signature of the Applicant, "*F. Perrett*," was written immediately below the receipt clause over an Inland

(1) 45 Ch. D. 291.

C. A.
1893
In re FRAPE.
Ex parte PERRETT.

Revenue 1*d.* stamp. It appeared from the evidence that before this account was drawn up a conversation had taken place between Mr. *Frape* and Mr. *Perrett*, in which Mr. *Frape* said that his costs would be over £100, and Mr. *Perrett* answered that he should think they ought not to be more than £60. Mr. *Frape* was never employed by Mr. *Perrett* in any other business.

Mr. *Perrett* afterwards obtained an order in the Queen's Bench Division that Mr. *Frape* should deliver his bills of costs. Accordingly Mr. *Frape* delivered ten bills of costs, amounting in the aggregate to £140 7*s.* 8*d.* The first three bills related to mortgage transactions, the other seven to attempted sales of the property and the actual sale. The present application was to have those bills taxed.

The summons was heard before Mr. Justice *North* on the 13th of January, 1893.

T. L. Wilkinson, for the Applicant:—

The question in this case turns on the construction of sect. 8 of the *Solicitors' Remuneration Act*, 1881 (1). It was held, under

(1) 44 & 45 Vict. c. 44, s. 8, "(1.) With respect to any business to which the foregoing provisions of this Act relate, whether any general order under this Act is in operation or not, it shall be competent for a solicitor to make an agreement with his client, and for a client to make an agreement with his solicitor, before or after or in the course of the transaction of any such business, for the remuneration of the solicitor, to such amount and in such manner as the solicitor and the client think fit, either by a gross sum, or by commission or percentage, or by salary, or otherwise; and it shall be competent for the solicitor to accept from the client, and for the client to give to the solicitor, remuneration accordingly.

"(2.) The agreement shall be in writing, signed by the person to be bound thereby or by his agent in that behalf."

"(4.) The agreement may be sued and recovered on or impeached and set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor; and if, under any order for taxation of costs, such agreement being relied upon by the solicitor shall be objected to by the client as unfair or unreasonable, the Taxing Master or officer of the Court may inquire into the facts, and certify the same to the Court; and if, upon such certificate, it shall appear to the Court or Judge that just cause has been shewn either for cancelling the agreement, or for reducing the amount payable under the same, the Court or Judge shall have power to order such cancellation or reduction, and to give all such directions necessary or proper for the purpose of carrying such order into effect, or otherwise consequential thereon, as to the Court or Judge may seem fit."

the Act of 1870, that an agreement between a solicitor and client as to the remuneration of the solicitor must, to be binding on either party, be signed by both: *In re Lewis* (1). The words of sect. 8, sub-sect. 2, of the Act of 1881, are not the same as those of sect. 4 of the Act of 1870. There is no reason for making a different rule in this respect between agreements as to contentious and non-contentious business. The effect of sect. 8, sub-sect. 2, of the Act of 1881 is to enable an agent to bind a party; at any rate, there must be clearly shewn to have been an agreement in writing, definite in its terms, to which each party has been shewn to have acceded: *In re West King & Adams* (2); *Stedman* v. *Collett* (3). Supposing the document in question would be a binding agreement, it would be necessary to shew the terms of the agreement on the face of it. Here it is impossible to say what costs the £80 refers to.

Peile, for the Respondent:—

The Act provides, in terms very similar to the *Statute of Frauds*, that the agreement is sufficient to bind a party if it is signed by him or his agent. In the case of *In re Palmer* (4), a letter by one party to the other was taken to be an agreement. The point, it is true, was not taken. But it must have been present to the minds of the Judges and counsel.

If it were necessary that the signature of the solicitor should appear on the writing, there is such a signature as would have been sufficient under the *Statute of Frauds* in the name of the solicitor at the head of the account written by his clerk. Even a printed bill-heading was held sufficient in *Evans* v. *Hoare* (5).

The words "agreed costs" are definite, they point to all the costs due from the client to the solicitor. "All the costs relating to the property" would be sufficient, for all the costs were incurred in respect of this property. Parol evidence will be admitted to shew what the costs referred to are, in the same way that it was admitted to shew the meaning of "your wool" in a letter: *Macdonald* v. *Longbottom* (6).

(1) 1 Q. B. D. 724, 726.
(2) [1892] 2 Q. B. 102.
(3) 17 Beav. 608.
(4) 45 Ch. D. 291.
(5) [1892] 1 Q. B. 593.
(6) 1 E. & E. 977, 987.

C. A.
1893
In re FRAPE.
Ex parte PERRETT.

If no agreement does exist binding on the client, these bills cannot be taxed unless special circumstances are shewn to exist, such as overcharge or undue pressure, because they have been paid by the deduction of £80. It is not necessary for payment that the bills should have been delivered: *Ex parte Hemming* (1); *Hitchcock* v. *Stretton* (2); not following *In re Street* (3); *In re Stogdon* (4).

NORTH, J.:—

I am of opinion that there must be taxation of all the bills. *Frape* acted as solicitor for Mr. *Perrett* in several matters, in respect, it is said, of a particular property; various things were done relating to that property, and it was ultimately sold. The purchase-money came into the hands of *Frape*, and an account was prepared by his clerk shewing what balance was owing to the client; it does not mention in any way the property in question. [His Lordship described the account referred to above, and continued:—] The application now made is for the taxation of ten bills of costs which have been delivered by Mr. *Frape* in pursuance of an order made in the Queen's Bench Division. In answer to that, it is said that there cannot now be any such taxation, because the amount is a subject of a valid agreement under the *Solicitors' Remuneration Act*, and upon that two questions are raised—whether the agreement is properly signed, and whether there is a binding agreement in terms. Those questions turn upon the 8th section of the *Solicitors' Remuneration Act*, 1881, which provides, sub-sect. 1: "With respect to any business to which the foregoing provisions of this Act relate," within which it is admitted the present bills fall, "whether any general order under this Act is in operation or not, it shall be competent for a solicitor to make an agreement with his client, and for a client to make an agreement with his solicitor, before or after or in the course of the transaction of any such business, for the remuneration of the solicitor, to such amount and in such manner as the solicitor and the client think fit, either by a gross sum, or by commission or percentage, or by salary, or otherwise." It is said

(1) 28 L. T. 144.
(2) [1892] 2 Ch. 343.
(3) Law Rep. 10 Eq. 165.
(4) 56 L. J. (Ch.) 420.

there was an agreement between the client and solicitor in respect of business transacted for the remuneration of the solicitor by a lump sum of £80. To consider the second question which arises in respect of the signature, there was a memorandum signed by *Perrett* alone, and not by his solicitor. Sub-sect. 2 provides: "The agreement shall be in writing, signed by the person to be bound thereby or by his agent in that behalf." The person against whom the agreement is sought to be enforced, who is said to be bound by it, is *Perrett*. It is signed by him. The question is, whether that is sufficient, or whether it is necessary that it should also have been signed by the solicitor. In my opinion, that is not necessary. According to the case of *In re Lewis* (1), to constitute an agreement under the 4th section of the *Solicitors Act*, 1870, it was necessary that the document should be signed by both parties; as there could not be said to be an agreement in writing between the parties not only unless the terms were clear, but unless also it was signed by both parties. In the present case, I have to deal, not with the Act of 1870, but with that of 1881, which is very different. That Act seems quite inconsistent with its being required that the agreement should be signed by both parties; the words are "signed by the person to be bound thereby." In my opinion, that phrase is entirely inconsistent with its being necessary that the other party should also sign it. The phrase is almost identical with one with which we are very familiar in the *Statute of Frauds*. Then it is said that the 2nd sub-section only has the effect of supplementing the Act of 1870, and making the party to be charged bound if the agreement is signed either by him in person or by his agent. In my opinion, that is not the meaning of this sub-section. It deals not only with the case of a memorandum signed by an agent, but also with the alternative of its being signed by the party to be bound himself. In my opinion, therefore, the signature of one party, the client, to the memorandum is sufficient to bind him, though it is not signed by the solicitor. This gets rid altogether of the question as to there being sufficient signature.

The next question is, whether, on the terms of the document,

(1) 1 Q. B. D. 724.

C. A.
1893
In re FRAPE.
Ex parte PERRETT.
North, J.

the agreement set up is found. In my opinion, the agreement in writing must shew what the material terms are; and I cannot refer to any other document not incorporated thereby, or to parol evidence, to construe it. The terms of the agreement must be in the document itself, including any other written document incorporated by sufficient reference therein. What agreement is here shewn? The writing says, "by agreed costs, £80." That £80 was deducted in respect of some agreed costs, and there is nothing to shew on the face of the writing what the agreed costs were. It is quite true that the money which had been received by Mr. *Frape* was derived from the proceeds of the sale of the property. There were, as was known at that time, certain proceedings in respect of which the solicitor had acted for his client. It was not known in what bills the work done would be included; that would depend very much on the way the solicitor chose to make out his bills. The solicitor has made out (I have no doubt properly) ten bills. Those bills, Mr. *Peile* tells me, all relate to the property sold. The first three relate to previous costs not in any way relating to the sale of the property; the remaining seven are said to refer more or less to the disposal of the property. The statement is, that £80 is deducted in respect of agreed costs. It might have been all the costs owing by the client—that would have been a different matter—or it might have been in respect of particular charges. I am only suggesting a mode in which the phrase might have been made definite. In my opinion, there is nothing to shew on the face of the document what are the costs subject to the agreement. It is said that it applies to all the costs owing by the client. If that were so, it would have been very easy to express the agreement in a way to shew that. As it is, the account does not shew what the costs are; and, therefore, we must go outside the writing to find its meaning.

It is suggested by Mr. *Peile*, that where something indefinite is referred to, say a house, the parties are always able to produce evidence to shew what house is referred to. I agree. If in this case the reference had been, for instance, to "bills of costs which have been made out," evidence could have been given to determine what bills of costs had been made out. But there is no

reference here to anything except to some agreement the terms of which are not stated—it is to "my costs which have been the subject of an agreement." In my opinion, therefore, the agreement fails, not because of want of signature, but for want of definiteness in defining to which costs it related. It is said that the fact that the bills have since been delivered shews what the bills were: as the solicitor might have delivered such bills as he thought fit. It is also said that the agreement here really is signed by both parties; it is said that the name *Frape* occurs in the heading of the account written by his clerk, and that that is sufficient signature to satisfy the statute: for that Mr. *Peile* refers to *Evans* v. *Hoare* (1). I do not find anything in the document before me that amounts to a signature of the solicitor, or was intended as a signature by him. I find in *Evans* v. *Hoare* Mr. Justice *Cave* lays down the law in this way (2): "No doubt, in attempting to frame a principle, one is obliged to depart somewhat from the strict lines of the statute. I am of opinion that the principle to be derived from the decisions is this. In the first place, there must be a memorandum of a contract, not merely a memorandum of a proposal; and, secondly, there must be in the memorandum, somewhere or other, the name of the party to be charged, signed by him or by his authorized agent. Whether the name occurs in the body of the memorandum, or at the beginning, or at the end, if it is intended for a signature there is a memorandum of the agreement within the meaning of the statute." Accepting that statement of law and applying it, I find that the name of the solicitor here is not intended as a signature, and that case does not affect the present.

Then I come to another point. It is said that these bills have been paid, and therefore cannot now be taxed unless special circumstances are shewn: and for that purpose *Ex parte Hemming* (3) and *Hitchcock* v. *Stretton* (4) are relied on. No bills had been delivered when the account was settled: they were applied for afterwards, and the solicitor would not deliver them, and an order for delivery was obtained in the Queen's Bench Division. The bills then delivered are ten in number. It is

(1) [1892] 1 Q. B. 593.
(2) Ibid. 597.
(3) 28 L. T. 144.
(4) [1892] 2 Ch. 343.

C. A.
1893
In re FRAPE.
Ex parte PERRETT.
North, J.

said that it must be taken that there has been a delivery of bills to which the payment of £80 referred. The cases of *In re Street* (1) and *In re Stogdon* (2) seem to me both confirmed by the observation of the Judges in *In re West King & Adams* (3); and in my opinion they are decisions binding on me. It is said that *Ex parte Hemming* (4) and *Hitchcock* v. *Stretton* (5) lay down different law; but in my opinion those cases do not remove the obligation on me to follow *In re Stogdon* and *In re Street*. Moreover, there is a great distinction between those cases and the present. In *Hitchcock* v. *Stretton*, Mr. Justice *Stirling* proceeds upon the cases of *In re Street* and *In re Stogdon*, and says that in his opinion the case before him is not inconsistent with *In re Street*: from which therefore he is not differing. Referring to Mr. Justice *Chitty's* comments on *Ex parte Hemming* in *In re Stogdon*, Mr. Justice *Stirling* says (6): "It seems to me that the explanation given by the learned Judge of the case of *Ex parte Hemming* comes to this, that although, if no bill of costs is delivered at all, then there is no payment within the meaning of the 41st section of the *Attorneys and Solicitors Act*, 1843, yet if a bill is delivered after a payment previously made, then the Court may look at the whole circumstances, and come to the conclusion that the payment which has been made is referable to the bill which is subsequently delivered, and, in that case, unless the Court finds special circumstances such as would justify the taxation of a bill under sect. 41, it is not a matter of course that the bill should be taxed."

In the present case, what I find is that £80 has been paid in respect of something, I do not know what; there is nothing to shew what the bills are which were agreed at £80; it is impossible to shew that there was a payment in respect of all the bills or any bills in particular; therefore the *ratio decidendi* of *Hitchcock* v. *Stretton* does not apply to this case. The intention may have been to have payment without there being any bills of costs, and to avoid the necessity of delivery of any bills. I am of opinion that to hold that the payment of the £80 was a payment

(1) Law Rep. 10 Eq. 165.
(2) 56 L. J. (Ch.) 420.
(3) [1892] 2 Q. B. 106.
(4) 28 L. T. 144.
(5) [1892] 2 Ch. 343.
(6) Ibid. 351.

in respect of these ten bills of costs to be afterwards delivered would be entirely at variance with the facts.

There must be taxation of the ten bills of costs.

D. P.

From this order Mr. *Frape* appealed.

The appeal was heard on the 27th of March, 1893.

Peile, for the Appellant, contended, as in the Court below, that there was a good agreement properly signed within the *Solicitors' Remuneration Act*, 1881, s. 8, sub-s. 2, which did not make it incumbent on both parties to sign; and further, that the Taxing Master had no power to inquire whether the agreement was unfair or unreasonable unless the client had previously taken some steps, either by bringing an action or by obtaining an order for taxation, to impeach the agreement on that ground. [He cited *In re Russell, Son, & Scott* (1); *In re Palmer* (2); and *Hitchcock* v. *Stretton* (3).]

T. L. Wilkinson, for the Respondent, Mr. *Perrett*, submitted that there was no sufficient signature to the account within the 8th section of the Act; that the words "By agreed costs £80" were too indefinite to constitute an agreement; and that at all events the client was entitled to an inquiry before the Taxing Master whether the agreement was unfair and unreasonable under sub-sect. 4 of the same section.

Peile, in reply.

LINDLEY, L.J.:—

This is an appeal from an order of Mr. Justice *North* referring a solicitor's bills for taxation, and the solicitor appeals to us on the ground that there ought to be no taxation, inasmuch as the costs were agreed at the sum of £80, and the bills were framed upon that basis. Now, the bill which was signed in February, 1892, was a bill stating the business done by the solicitor; and the costs, to which I will refer presently, were costs incurred for

(1) 30 Ch. D. 114. (2) 45 Ch. D. 291.
(3) [1892] 2 Ch. 343.

C. A.
1893
In re FRAPE.
Ex parte PERRETT.
Lindley, L.J.

certain purposes from April, 1891, down to the time of settlement, and the expression in the bill about the costs was this: "By agreed costs £80." That sum of £80 is deducted from a balance of £123 shewn to be due from the solicitor to his client in respect of the transactions referred to, and leaves due to the client £43 4*s.* 6*d.*

There is a note at the foot, "Received this 23rd day of February, 1892, of Mr. *H. D. Frape,* the sum of £43 4*s.* 6*d.*, in settlement of above account, to which I hereby agree." That is signed by the client. The first question is whether such an agreement as this comes within sect. 8 of the *Solicitors' Remuneration Act,* 1881, which altered the law in favour of the solicitors, and made agreements with them binding as to the settlement of costs. [His Lordship read sect. 8, sub-sects. 1 and 2, and continued:—]

Considering sub-sect. 2, one is struck by the provision that the agreement is to be signed by one of the parties to it. What is meant by an agreement signed by the person to be bound? The sub-section does not mean signed by both parties, because only one is required to sign. It means that the person to sign is the person who seeks to get rid of the agreement, and who is sought to be bound by it. Here the client seeks to get rid of the agreement, and he is the person who signs it. In such a case it is sufficient for him to sign it whatever the solicitor may do. It was held by Mr. Justice *North* that the agreement was not an agreement within the Act. He was of opinion there was too much obscurity about the costs. In the words "By agreed costs" there is nothing to guide us. We have to bring our ordinary knowledge of business transactions into the matter, and, looking at the account, headed as it is as an account with a solicitor, and bearing in mind that there was a balance in the hands of the solicitor to be handed over, and considering the sort of business which had been transacted, I cannot help thinking that the agreed costs must mean, upon a reasonable construction of the document, that the costs were to be £80 down to the present time. Therefore I think that Mr. Justice *North* attached too much weight to the apparent ambiguity of the expression "agreed costs." I think that there was an agree-

ment binding on the client under the statute, as it was signed by him, although not signed by the solicitor.

That being so, the solicitor says there ought to be no taxation. But it is necessary to read more of this section, and sub-sect. 4 of sect. 8 runs thus: [His Lordship read sub-sect. 4, and proceeded:—]

Upon this appeal it was argued that if there is reason to suppose the agreement is unfair or unreasonable, yet you cannot impeach it on such a summons as this, but that some kind of formal proceeding, which I suppose, according to the present practice, would be an action to set it aside, must be instituted. The language of the Act rather seems to favour that view. But when you consider it carefully, it appears to me there is really nothing in the argument; because, so long as the solicitor has a proper opportunity of resisting taxation, it cannot matter whether the application to tax is by writ or by a special petition to tax or a summons to tax, as in this case. The client may say, "I want an order to tax notwithstanding the agreement." The agreement can be no answer to that, if he can shew reasons why there ought to be a reference to the Taxing Master to inquire into that agreement. It appears to me that the view taken of this section by Lord Justice *Cotton* is in accordance with common sense. Lord Justice *Cotton*, in *In re Palmer* (1), says this: "Then it is said that, having regard to the 4th sub-section of the 8th section, this agreement ought to be referred to the Taxing Master. But the Appellant has not brought forward any evidence shewing that this charge is unfair or unreasonable; and although the 4th sub-section does, in my opinion, give the Court power, where an agreement is so impeached, to refer it to the Taxing Master to consider whether the charge is fair and reasonable, no foundation for such an order has been made. Mr. *Farwell* has argued that this is a very unreasonable charge; but I do not think that he says it is unfair. I consider, however, that the Court ought not, merely upon such an argument by counsel, unsupported by affidavit or facts which will lead to that conclusion, to refer such an agreement to the Taxing Master to exercise the power given by the 4th sub-division of the 8th

(1) 45 Ch. D. 298.

C. A.
1893
In re FRAPE.
Ex parte PERRETT.
Lindley, L.J.

section." It appears to me that it would not be right to say, upon the materials before us, that this agreement was unfair and unreasonable. On the other hand, the evidence about it is such as to render it right to direct an order to tax, and the Taxing Master will have to look into the question and see what the truth is. The fact is, that it is impossible to decide whether the agreement is unfair or unreasonable without taxing the bill. There is a great deal of doubt about it, and it is sufficient for us to say that the case ought to be inquired into. That being so, my Brothers and I think the right order will be this: To let the order of Mr. Justice *North* stand, but to add to it a direction that the Taxing Master is to certify whether the agreement was fair and reasonable, which he cannot do without taxing the bills. Then the costs of taxing the bills will be as directed by the Judge after taxation.

The costs of the appeal and of the application to Mr. Justice *North* to be reserved.

KAY, L.J.:—

I agree with what Lord Justice *Lindley* has suggested as the right order between these parties. With regard to the pay of this solicitor, it appears he had received £457 18*s.* 4*d.* as the purchase-money for an estate which he was selling for his client. On the other hand, he had an account against the client for advances made by him and payments on behalf of the client of £334 13*s.* 10*d.* That left a balance in hand of £123 4*s.* 6*d.* Then he reckoned his costs. The client was very anxious to have some of that balance paid to him, and the solicitor said according to his evidence that he told the client his costs would be over £100. They would be greatly over £100 if no balance was to come to him. When a man says his costs will be over £100, he does not mean so much over as £23 4*s.* 6*d.* Then the client said, having no means of judging, except from his general knowledge of the business done, that he thought they should not be more than £60. The solicitor, after some discussion, agreed to take £80, and then comes a written agreement which appears in the form Lord Justice *Lindley* has pointed out, and which is signed by the client.

Now, apart from any agreement, the evidence satisfies me that this is a proper case for taxation. The client has come in time. The old rule that you must shew either gross fraud or pressure and overcharge does not obtain as an absolute rule. A decision in the Court of Appeal intimates that is not an absolute rule (1). If it were necessary to apply the old rule, I must say, in considering the relative position of these parties, the client was under considerable pressure. He wanted to get some of his money, and he knew very well he could not get any of it without satisfying the claims of his solicitor, and he was thus induced to come to this arrangement.

As to the first point raised under the Act, that it does not sufficiently appear on the face of the document what the costs were which are stated to be agreed costs, with deference to the learned Judge, I think we must come to the conclusion that the costs were all the costs which he owed to the solicitor down to the date of this agreement, and that the agreement was a sufficient agreement to take all the costs which had been incurred at this sum of £80. Then the Act of Parliament comes in, which is expressed in very odd language. It seems rather inaccurately to borrow the language of the *Statute of Frauds*; but the *Statute of Frauds* does not say, "the agreement must be signed by the party to be bound thereby"; it only says that no action shall be brought on any agreement unless a memorandum of it is signed by the party to be charged. Sect. 8 of this Act says that it shall be competent for a solicitor to make an agreement with his client, and for the client to make an agreement with his solicitor, as to remuneration of the solicitor, and that the agreement shall be in writing—not that there shall be a memorandum in writing of a verbal agreement. It is to be signed by the person to be bound, or by an agent on his behalf. That seems very inartificial language, but the meaning is clear. If the agreement is to be enforced against the man who has signed it, the person who is seeking to enforce it would be bound by it himself. Therefore it is not necessary it should be signed by both. If the signed agreement was an agreement for the

(1) *In re Boycott*, 29 Ch. D. 571; *In re Norman*, 16 Q. B. D. 673; *In re Cheesman*, [1891] 2 Ch. 289.

C. A.
1893
In re FRAPE.
Ex parte PERRETT.
Kay, L.J.

settlement of all the costs then due from him to the solicitor by which he is bound, then comes the question whether on an application for a special order to tax, the 4th sub-section which Lord Justice *Lindley* has read applies so as to enable the Court under that Act to direct the Taxing Master to examine whether the agreement is reasonable or not. Lord Justice *Cotton* seems to have thought it did. I agree with the *dictum* on that point, and I think it does. I think upon a special application under that section, if a solicitor sets up an agreement as a bar to any right to tax, and the client impeaches the agreement as unreasonable, the Court can use the power given it by that sub-sect. 4 of directing the Taxing Master to examine the reasonableness or unreasonableness of the agreement; and if it is found to be unreasonable, I think under that statute there is power to order its cancellation.

Then the only question remains: Do the facts warrant the Court in taking such a course? Now one argument on the facts weighed strongly on my mind. A discussion took place when the client wanted to get some of the balance of £123 which remained in the hands of his solicitor. The solicitor says, "My costs amount to over £100," and then he consents to take £80. Afterwards the client has the bills delivered, and those bills make up these very costs which the solicitor had said would be over £100 to as much as £140. That strikes me as a very extraordinary circumstance indeed, and seems to me to raise a suspicion that these bills cannot be made up of fair charges. We have evidence besides which confirms that suspicion, and, at any rate, places the case *primâ facie* as one of overcharge under circumstances amounting in my opinion to that pressure which would entitle the client to have the bills taxed if there had been no agreement. The agreement, being impeached as an unfair and unreasonable agreement under this section, can be referred to the Taxing Master. I agree that the proper mode of doing it is that which has been suggested by the order indicated by Lord Justice *Lindley* in his judgment, that the order be varied to the extent he has indicated, and directing that the matter go to the Taxing Master. With regard to the other question as to the costs of the appeal, there will be a taxation

of the costs incurred in the Court of Appeal, and they will be reserved.

A. L. SMITH, L.J.:—

I agree with Lord Justice *Lindley* in all he has stated. I have nothing to add.

Solicitors for Applicant: *Atkinson & Dresser*, agents for *Trevor Pollard & Co., Brighton.*

Solicitors for Respondent: *Venn & Woodcock*, agents for *H. D. Frape, Brighton.*

M. W.

CHITTY, J.
1893
March 15.

In re J. BROWN'S ESTATE.
BROWN *v.* BROWN.

[1880 B 0308.]

Mortgage—Joint and several Covenant by Mortgagee and Surety—Payment on Demand—Collateral Security—Necessity of Demand—Statute of Limitations (3 & 4 *Will.* 4, *c.* 42), *s.* 3.

Where there is a present debt and a covenant or promise to pay on demand, the demand is not considered a condition precedent to bringing the action; but where there is a covenant or promise to pay a collateral sum, on demand—*e.g.*, in a covenant by a surety for the principal debtor—then request must be made before action brought, or before the money can be considered as owing by the collateral debtor.

Birks v. *Trippet* (1) discussed and applied.

A mortgage of September, 1867, contained a joint and several covenant by a father and his son to pay the mortgagee £3000 "on demand," and that they would, "in the meantime from the date hereof," pay interest on the same, at the rate therein mentioned. The father, who had joined as surety only, died in November, 1872, and his estate was being administered in an action commenced in April, 1880. No claim was made against the father's estate in respect of his liability on the covenant in the mortgage, until July, 1889. The mortgagee now claimed to be let in as a creditor of the father's estate, in respect of the amount due on the mortgage, which the son was unable to pay:—

Held, that the right of action did not accrue against the father's estate until July, 1889, when demand was first made, and consequently that the mortgagee was entitled to come in and prove his claim against the father's estate, without disturbing any dividends already distributed.

ADJOURNED SUMMONS.

By a mortgage of the 26th of September, 1867, made between *Alfred Brown* of the first part, the above-named *John Brown* (father of the said *Alfred Brown*) of the second part, and one *Stephen Perry* of the third part, after reciting that the said *Alfred Brown* had requested the said *Stephen Perry* to lend him the sum of £3000, which he had agreed to do, upon having the same with interest secured in manner thereinafter expressed, it was witnessed that, in consideration of £3000, paid by the said *Stephen Perry* to the said *Alfred Brown*, the said *Alfred Brown* conveyed

(1) 1 Wms. Saund. 32.

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certain hereditaments, therein described, unto and to the use of the said *Stephen Perry*, his heirs and assigns, subject to a proviso for redemption thereof if the said *Alfred Brown*, his heirs, executors, administrators, and assigns should, "on demand, pay unto the said *Stephen Perry*, his executors, administrators, or assigns £3000 sterling, with interest for the same from the date hereof," at 5 per cent. per annum. And the said *Alfred Brown* and *John Brown* did thereby jointly covenant for themselves, their heirs, executors, and administrators, and each of them did thereby separately, for himself, his heirs, executors, and administrators, covenant with the said *Stephen Perry*, his executors, administrators, and assigns, that they, or one of them, their, or one of their, heirs, executors, administrators, or assigns would, "on demand, pay unto the said *Stephen Perry*, his executors, administrators, and assigns, the sum of £3000 sterling," and also would, "in the meantime from the date hereof" pay interest on the same at the rate of £5 per cent. per annum, by equal half-yearly payments as therein provided.

By another mortgage of the 3rd of October, 1867, the said *John Brown* joined with another son, *Joseph Grainger Brown*, in a precisely similar joint and several covenant for the repayment to other mortgagees of a sum of £6000, and interest at £5 per cent.

John Brown joined in both these mortgages as surety for his sons.

John Brown died in November, 1872, at which time the properties comprised in the mortgages were believed to be sufficient to pay off the principal moneys secured thereon.

On the 16th of April, 1880, the above-mentioned action was commenced for the administration of the estate of the said *John Brown*, and by a judgment of the 29th of May, 1880, the usual administration order was made, and certain accounts and inquiries were directed, including an account of the testator's debts, and the testator's residuary real estate was ordered to be sold.

Pursuant to this judgment, the usual advertisements for creditors to come in and prove their debts were issued, and the time fixed for bringing in claims expired in 1880, without any claims having been sent in.

CHITTY, J.
1893
In re J. BROWN'S ESTATE.
BROWN *v.* BROWN.

No claim was made against the estate of *John Brown*, in respect of his liability under the covenant in the mortgage of the 26th of September, 1867, until July, 1889, and no claim was made in respect of his liability under the covenant contained in the mortgage of the 3rd of October, 1867, till October, 1889.

The security in both mortgages being now considered wholly insufficient, by reason of the agricultural depression, and the testator's sons being unable to pay, the mortgagees now applied by summons in the action, that notwithstanding the time limited for making claims had expired, they might respectively be at liberty, under the judgment of the 29th of May, 1880, to make and establish their claims, as creditors upon the estate of the said *John Brown*, for the amount now due to them upon their respective mortgages.

The estate of *John Brown* had not been distributed.

These summonses were adjourned into Court, when the only question argued which calls for any report was, whether the Applicants were barred by the *Statute of Limitations* (3 & 4 Will. 4, c. 42), s. 3.

Farwell, Q.C., and *G. N. Marcy*, for *Alfred Brown's* mortgagee:—

The principal money secured by this mortgage did not become payable till July, 1889, when demand was first made for payment; by the terms of the deed a demand was a condition precedent. The present case is analogous to that of a bond payable on demand, where there is no breach of the condition until demand is made: *Carter* v. *Ring* (1); *Sicklemore* v. *Thistleton* (2); *Toms* v. *Wilson* (3). That a previous demand was necessary is almost obvious, because the mortgagor must have some reasonable time to get his money ready. So, too, in the case of a defeasance on a warrant of attorney given to secure payment of a sum on demand, an actual demand was held necessary: *Nicholl* v. *Bromley* (4). Money due on a covenant in a mortgage is quite different from the case of money due on bill of exchange or promissory note, which are negotiable instruments. As said by

(1) 3 Camp. 459.
(2) 6 M. & S. 9.
(3) 4 B. & S. 442.
(4) 2 Brod. & B. 464.

Blackburn, J., in *Brighty* v. *Norton* (1), "the law merchant applies to bills of exchange, and the debtor is bound to have the money ready on demand;" but in the case before him, which was a bill of sale, he says some notice was necessary before the defendant could seize and sell.

[CHITTY, J.:—The case as reported in 3 *B. & S.* 305 does not contain the observations you are quoting.]

On the construction of the deed it is plain that it was never intended the mortgage should become absolute from the time of its execution.

Vernon R. Smith, for persons claiming under the mortgage of the 3rd of October, 1867, adopted the above argument.

George Henderson, for *John Brown's* executors:—

According to the analogy of the law of negotiable instruments payable on demand, no demand was necessary in this case, and the money was due as soon as the mortgages were executed: *Norton* v. *Ellam* (2); *Jackson* v. *Ogg* (3), and the fact that interest was made payable "in the meantime" did not prevent the debt being at maturity at once: *In re George* (4).

The case of *Carter* v. *Ring* (5) is distinguishable on the ground that the words "on demand" occurred in the defeasance of the bond.

[CHITTY, J., referred to *Collins* v. *Benning* (6); *Rumball* v. *Ball* (7), and *Capp* v. *Lancaster* (8).]

No demand or claim having been made against the testator or his estate for more than twenty years, the Applicants are barred by the *Statute of Limitations*.

Farwell, in reply:—

There is a difference between a promise to pay on demand and a promise to pay a collateral sum upon request, for then a request is a condition precedent: *Birks* v. *Trippet* (9). Here the testator

(1) 32 L. J. (Q.B.) 38, 40.
(2) 2 M. & W. 461.
(3) Joh. 397.
(4) 44 Ch. D. 627.
(5) 3 Camp. 459.
(6) 12 Mod. 444.
(7) 10 Mod. 38.
(8) Cro. Eliz. 548.
(9) 1 Wms. Saund. 32.

CHITTY, J. 1893 *In re* J. BROWN'S ESTATE. BROWN v. BROWN.

was not the principal debtor; he was only giving a collateral security for his son's debt.

CHITTY, J:—

The claims of the two applicants are founded upon covenants. The covenants are the same in each of the mortgages, and my judgment in the one case will apply to the other.

The covenant is by the testator, *John Brown*; it is a separate covenant, and the question for decision is one on the construction of the covenant.

[His Lordship then stated the mortgage of the 26th of September, 1867, and continued:—] Now, for those interested in the testator's estate it is said that the meaning of the words "on demand" is the same as that which has been attributed to them in promissory notes and the like. The law is quite settled that, with regard to a promissory note payable on demand, no demand is necessary before bringing an action; and indeed the *Statute of Limitations* begins to run from the making of the note.

It was suggested by Mr. *Farwell* in his argument, that the class of cases, to which I am now alluding, were all referable to the law merchant, and a passage from Mr. Justice *Blackburn's* judgment in the case of *Brighty* v. *Norton* (1), was relied on for that purpose. But in the report of the same case in 3 *Best* and *Smith* (2), the passage is omitted. I am not satisfied that the distinction attempted to be made between the law merchant and the general law with regard to the meaning of the words "pay on demand" can be supported. Lord *Wensleydale* (then Baron *Parke*), in the well-known case of *Norton* v. *Ellam* (3) does not draw that distinction. He says (4): "I entertain no doubt at all on this point"—that is about the *Statute of Limitations* running from the date of the note. "It is the same as the case of money lent payable upon request, with interest, where no demand is necessary before bringing the action." That is a general proposition and not one based upon the law merchant; and, without going through the whole of the cases to which I have referred in the course of the argument, it is plain that a distinction has been

(1) 32 L. J. (Q.B.) 40.
(2) Page 305.
(3) 2 M. & W. 461.
(4) Ibid. 464.

taken and maintained in law, the result of which is, that where there is a present debt and a promise to pay on demand, the demand is not considered to be a condition precedent to the bringing of the action. But it is otherwise on a promise to pay a collateral sum on request, for then the request ought to be made before action brought. I think the distinction which I have mentioned, is sufficiently pointed out in *Saunders'* argument in *Birks* v. *Trippet* (1), which was accepted by the whole of the Court, the Judges having been apparently somewhat impatient at the learned counsel labouring his argument to the extent he did.

It is a question, then, of the construction of the instrument; and it is not immaterial to observe that the testator here was a surety. Nor is it immaterial to observe, that the proviso conferring the right of redemption on the son, is framed in a similar manner to the covenant, and there is in the proviso for redemption, as well as in the covenant, a distinction with regard to interest, which would be no distinction if the argument for the Respondent could be maintained, the distinction being, a distinction between "on demand" as to principal, and "from the date hereof" as to interest. In other words, the proviso for redemption would have to be read, according to the Respondent's argument, in this way: This being a mortgage transaction and the sum of £3000 lent on the security of the land, the words "pay on demand" must be transmuted to "shall pay on the date hereof." The interest is to run "from the date hereof" according to the express words of the proviso. I can see no ground for putting a different construction in this respect on the proviso and on the covenant; and I therefore come to the conclusion that the meaning of the covenant is, and the meaning of the parties sufficiently manifested by the language they have used is, that there shall be a demand precedent to the bringing of any action on the covenant of the surety. The father, as surety, was to have some time, that is a reasonable time, which it is not necessary for me to attempt to define; but he was to have a reasonable time, after demand, to find the money which he has to pay. The covenant itself as to interest is a separate covenant,

(1) 1 Wms. Saund. 32.

CHITTY, J.
1893
In re J. BROWN'S ESTATE.
BROWN *v.* BROWN.

the words being "will in the meantime." What force can be attributed to the words "in the meantime" if the words "on demand" mean at the date of this deed?

That being my opinion upon the construction of the instrument, and it being admittedly a question of construction, it is hardly necessary to refer to the authorities. I may, however, mention *Carter* v. *Ring* (1), where the action was brought on the bond, the defeasance of the bond being to pay one-half of the amount of the penal sum on demand with lawful interest, and Lord *Ellenborough* held (no doubt it was only a *Nisi Prius* decision) that the plaintiff, in such a case as that, was bound to prove a demand before he could succeed. I am unable to follow the distinction attempted to be made with regard to this case, founded on the suggestion that the words "on demand" came in the defeasance of the bond. I can see no difference between the words occurring in the defeasance of a bond, or in a covenant in which there is no defeasance.

With regard to the other cases, there is *Sicklemore* v. *Thistleton* (2); but upon that it appears to me, there could have been little doubt as to the meaning of the parties that the demand did mean a demand, as was there held, the only difference in the case being that there were two covenants. It is not necessary to cite any further authority, and I am of opinion that the right of action did not accrue against the testator till demand made, and it is admitted that the demand was made for the first time in 1889. That being so, I think both the Applicants are entitled to be admitted now, to come in and prove. The estate under administration has not been fully administered. Of course they could not, and do not, disturb anything that has been already done in the way of payment to other creditors or the like. There has been no *laches*. There is no such conduct on their part as would justify the Court, according to the ordinary rule, in precluding these Applicants although they come late.

Solicitors: *Prior, Church, & Adams; Patersons, Snow, Bloxam, & Kinder*, agents for *F. T. Veley, Chelmsford; J. Plaskitt*, agent for *F. Smoothy, Braintree.*

(1) 3 Camp. 459. (2) 6 M. & S. 9.

W. C. D.

STEVENS *v.* TREVOR-GARRICK.

CHITTY, J.

1893

March 15.

[1892 S. 2685.]

Married Woman—Separate Estate—Settlement by an Infant—Subsequent Repudiation—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 2, 19.

An infant, being entitled on her marriage to a sum of £1000, by her settlement, in April, 1890, joined with her intended husband in assigning the same to trustees, to be held by them upon the usual trusts for the benefit of herself, her husband, and children. In October, 1891, the lady attained twenty-one, when she disaffirmed the settlement, and then claimed to be absolutely entitled to this sum of £1000:—

Held, that the reasons given in *Hancock* v. *Hancock* (1) as to the effect of sect. 19 of the *Married Women's Property Act*, 1882, on the operation of sect. 5 of that Act, were equally applicable to modify the operation of sect. 2, and that, consequently, the sum of £1000 was effectually included in the settlement by the husband's assignment, and could not be dealt with by the wife, notwithstanding her repudiation of the settlement when she attained twenty-one.

ADJOURNED SUMMONS.

By an antenuptial settlement, dated the 12th of April, 1890, and made between the Rev. *Frederick Steven Trevor-Garrick* of the first part, *Margaret Elphinston*, an infant, of the second part, and the trustees of the third part, after reciting that the said *Margaret Elphinston* would upon her marriage become entitled to a sum of £1000 payable by way of dowry out of the *Bombay Civil Service Fund*, but that it was intended that such sum should be retained by the *India Office* until the said *Margaret Elphinston* should attain the age of twenty-one years, and that upon the treaty for the said intended marriage it was agreed that the said sum of £1000 should be assigned to the trustees upon the trusts therein declared concerning the same; the said *Margaret Elphinston* and *Frederick Steven Trevor-Garrick* respectively assigned to the trustees the said sum of £1000, to which the said *Margaret Elphinston* would upon her marriage become entitled as aforesaid, to be held by them upon the usual trusts for the benefit of the said *Margaret Elphinston*, her husband,

(1) 38 Ch. D. 78.

CHITTY, J.
1893
STEVENS v. TREVOR-GARRICK.

and children. This settlement was not made under the *Infant Settlements Act*, 1855 (18 & 19 Vict. c. 43).

Miss *Elphinston* and the Rev. *Frederick Steven Trevor-Garrick* were married shortly afterwards, and notice of the above assignment of the £1000 was given by the trustees to the *India Office*.

On the 14th of October, 1891, Mrs. *Trevor-Garrick* attained the age of twenty-one years, and soon afterwards disaffirmed the said settlement, and by a deed-poll of the 19th of May, 1892, she formally repudiated and disavowed the same, and the assignment and assurances therein contained, and declared her execution of the said indenture to be null and void. Mrs. *Trevor-Garrick* now claimed to be absolutely entitled to take this sum of £1000 and use it for her own purposes; but as the authorities at the *India Office* declined, under the circumstances, to pay it either to her or to the trustees, the present action was commenced by the trustees against Mr. and Mrs. *Trevor-Garrick*, for the purpose of obtaining the opinion of the Court upon the question, and a summons was taken out in this action, asking for a declaration that the Plaintiffs, as trustees of the said indenture of settlement, were entitled to the sum of £1000. This summons was adjourned into Court, and now came on for argument.

Vernon R. Smith, for the Plaintiffs:—

But for the *Married Women's Property Act*, 1882, the husband on marriage would have become entitled to this fund, and he has purported to assign it to the trustees, and his assignment is still good. This fund would only have been the separate property of the lady by virtue of sect. 2, and sect. 19 of the Act says that nothing in the Act is to interfere with any marriage settlement. The reasoning of the decision in *Hancock* v. *Hancock* (1), on the effect of sect. 19, is quite as applicable to sect. 2 as to sect. 5. *Hancock* v. *Hancock* covers this case, and the trustees are entitled to the fund, notwithstanding the subsequent repudiation of the settlement by the lady on attaining twenty-one.

[*In re Johnson* (2); *In re Stonor's Trusts* (3); and *In re Whitaker* (4), were also referred to.]

(1) 38 Ch. D. 78.
(2) [1891] 3 Ch. 48.
(3) 24 Ch. D. 195.
(4) 34 Ch. D. 227.

Brinton, for Mrs. *Trevor-Garrick*:—

The settlement and the marriage were after the passing of the *Married Women's Property Act*, 1882; and under the circumstances there is now, as a fact, no settlement by the wife; therefore, this fund, by virtue of sect. 2, belongs to her absolutely.

If this is a settlement at all, this is a settlement by the husband, and to hold that it is binding on the wife's separate property would produce the absurd result suggested by your Lordship in *In re Queade's Trusts* (1).

[CHITTY, J.:—That case was not approved of by the Court of Appeal in *Hancock* v. *Hancock* (2), which is binding on me now.]

Sect. 19 was never intended to operate in the way contended for by the trustees, and I submit that the wife is now entitled to be paid this fund.

CHITTY, J.:—

Sect. 19 of the *Married Women's Property Act* relates not merely to settlements made before the passing of the Act, and before the Act came into operation, but settlements to be made. That does not mean only settlements made after the Act was passed and before it came into operation. According to the plain words of the section, it means settlements to be made at any time after the passing of the Act. About that there can be no doubt.

The settlement in this case was made before marriage, and the parties to it were the intended husband and the intended wife. The wife, on marriage, was entitled to a sum of £1000, which, apart from this Act of Parliament, was her property, not settled to her separate use, and which, apart from this Act of Parliament, would have passed on the marriage to her husband had there been no settlement. They both of them assigned this fund of £1000 to trustees upon the trusts of the settlement. The lady was an infant at the time. Now, having become of age, she disaffirms the settlement—that is, of course, so far as she can disaffirm it.

It is argued upon this, that there is no settlement within the

(1) 33 W. R. 816; 54 L. J. (Ch.) 786. (2) 38 Ch. D. 78.

CHITTY, J.
1893
STEVENS v. TREVOR-GARRICK.

meaning of the 19th section. In my opinion there is a settlement, which, apart from the *Married Women's Property Act*, would be a valid settlement by the husband. Continuing the consideration of the 19th section, the 19th section says that "nothing in this Act contained shall interfere with or affect any settlement . . . made or to be made." The Court of Appeal have held, and what they have held is binding upon me, that the words "nothing in this Act" include, what it is plain they do include, the 5th section, and that was made the ground of the decision in *Hancock* v. *Hancock* (1). After reading the 19th section, Lord Justice *Cotton* says (2): "Undoubtedly there was a settlement here, and it was respecting the property of this lady, and if we look at the natural meaning of the words of the section, we cannot help saying that it excepts from the Act everything which would interfere with the settlement and would prevent the covenants contained in it from having operation." That reasoning, on which the decision is founded, compels me to hold that the words at the commencement of the 19th section apply, not merely to the 5th section, but to the 2nd section also. The Court of Appeal had before it the case where the marriage and the settlement had taken place before the commencement of the Act. It appears to me that I am bound by the principle of the decision, and am not entitled to say that though the 5th section is excluded by the 19th, the 2nd section is not. It would not be respectful for me to comment upon the decision of the Court of Appeal. It is my duty to follow it; and if it does lead to strange and anomalous conclusions, all I can say is, that that is the result of what the Legislature have said according to the interpretation put upon it by the Court of Appeal.

That being so, there is no alternative open to me except to say that the trustees are entitled to this sum of £1000.

Solicitors: *Lovell, Son, & Pitfield; A. J. Nash*, agent for *Ginn & Matthew, Cambridge.*

(1) 38 Ch. D. 78. (2) 38 Ch. D. 89.

W. C. D.

PEPE *v.* CITY AND SUBURBAN PERMANENT BUILDING SOCIETY.

CHITTY, J.
1893
March 10, 17.

[1893 P. 521.]

Building Society—Member—Notice of Withdrawal—Alteration in Rules after Notice and before Payment.

The Plaintiff was the holder of four fully paid-up shares in a building society. By one of the rules of the society a member on giving one month's notice in writing might withdraw his shares. The rules also provided that they might be altered by a majority of three-fourths of the members.

The Plaintiff gave the requisite notice of withdrawal; but after such notice and before he was repaid the above rule was altered by giving the directors power to pay off in priority members holding less than £50 in the society:—

Held, that although the Plaintiff had at the date of his notice of withdrawal under the rule then in force a vested right to be paid the amount due on his shares, he being still a member of the society, was liable to have this right divested by a subsequent alteration in the rule duly made, and that he was therefore bound by the altered rule.

MOTION.

The above society was incorporated under the *Building Societies Act*, 1874 (37 & 38 Vict. c. 42).

In March, 1888, the Plaintiff became a subscriber or member of the Defendant society in respect of two shares of £50 each, and by monthly payments between that date and December, 1889, he paid in all £100, being the full value of those shares. The Plaintiff also purchased in the same month two other £50 shares in the society. The Plaintiff had not charged or encumbered any of the above shares.

By rule 5 of the society's rules in force when the Plaintiff joined the society, any member upon giving one month's notice in writing might withdraw his investments at any monthly meeting.

The Plaintiff, being desirous of withdrawing his subscriptions or investments, on the 5th of January, 1891, gave notice in writing under the 5th rule of his wish and intention to do so, but did not receive payment.

CHITTY, J.
1893
PEPE
v.
CITY AND SUBURBAN PERMANENT BUILDING SOCIETY.

In May, 1892, after the Plaintiff's notice of withdrawal, the society by a majority of three-fourths of its members required for such purpose by the rules, altered the 5th rule by giving the directors power in their discretion to make prior payment to any member having not more than £50 standing to his credit on the books of the society on such terms as might be arranged between the member and the directors should the directors deem the same beneficial to the society.

The Plaintiff objecting to be bound by this altered rule, commenced this action to have it declared that the rule was not binding on him and was *ultrà vires*, and he now moved for an injunction. It was agreed that the motion should be treated as the trial of the action.

Morton Daniel, for the Plaintiff:—

A member who has given notice of withdrawal is not bound by rules passed after such notice has been given.

The altered rules might entirely change the contract entered into between the Plaintiff and the society. On giving notice of withdrawal, the Plaintiff had a vested right to be paid his subscriptions according to the rule then in force. The contract between the Plaintiff and the society gave him the right to give notice of withdrawal, and when he had given notice to be paid, nothing that subsequently happened could deprive him of that right: *Auld* v. *Glasgow Working Men's Building Society* (1).

[He also referred to *Davies* v. *Second Chatham Permanent Benefit Building Society* (2).]

Farwell, Q.C., and *A. àB. Terrell*, for the Defendants:—

A member of a building society who has given notice of withdrawal but has not received his money is still a member of the society and subject to the altered rules: *Sibun* v. *Pearce* (3); *Walker* v. *General Mutual Building Society* (4).

An advanced member is bound by an alteration made in the rules of the society after the date of his mortgage: *Rosenberg* v.

(1) 12 App. Cas. 197.
(2) 61 L. T. (N.S.) 680.
(3) 44 Ch. D. 354.
(4) 36 Ch. D. 777.

Northumberland Building Society (1); *Wilson* v. *Miles Platting Building Society* (2).

Morton Daniel, in reply.

CHITTY, J.:—

The question is, whether the Plaintiff is bound by the altered rule. He gave notice of withdrawal under the rule as it stood when he became a member; but after the notice and before payment of the amount due to him the rule was altered, and altered to his detriment. For, without taking away his right of withdrawal, the new rule gives a discretionary power to the directors to make prior payments to any member whose holding is below £50, the effect of which would be to postpone for a time payment to the Plaintiff.

It was part of the Plaintiff's contract with the society that the rules might be altered, and the power of altering them was wisely framed, so as to require, not a bare majority, but three-fourths of the members to bring about the alteration.

Now, what is the position of a member of a building society who has given notice of withdrawal? The question cannot be better answered than in the words of Lord Justice *Lindley* in *Sibun* v. *Pearce* (3), where he says (4): "The true mode of describing him is to describe him as a member who has given notice of withdrawal, and is entitled to payment." That definition gets rid of the vague and unsatisfactory terms of *quasi* member and *quasi* creditor. It has been settled by a series of authorities, that a person in such a position is still a member of the society, and it follows that, under his contract with a society which has power to alter its rules, he remains subject to the rules when duly altered. In this case it is admitted that the rule was duly altered.

The Plaintiff's counsel says rightly that, when the Plaintiff gave notice of withdrawal, he had a vested right to be paid according to the then existing rule; but this does not settle the question, because there existed also against him the power of

(1) 22 Q. B. D. 373.
(2) Ibid. 381, n.
(3) 44 Ch. D. 354.
(4) Ibid. 371.

CHITTY, J.
1893
PEPE
v.
CITY AND SUBURBAN PERMANENT BUILDING SOCIETY.

altering the rule, so that the question assumes this form, that he had a vested right liable to be divested by any later rule duly passed. It may be wondered that the society should have such a power; but it may be also greatly for the benefit of all concerned to make alterations. And I say also, that members place reliance on the sense of justice of the three-fourths majority required to effect the alteration.

Cases such as *Rosenberg* v. *Northumberland Building Society* (1) and *Wilson* v. *Miles Platting Building Society* (2) do not conclude the present question, as they turned on the effect of a covenant in a mortgage deed binding the mortgagor, not merely by the then existing rules, but by the rules for the time being of the society. But in the two cases of *Davies* v. *Second Chatham Permanent Benefit Building Society* and *Mackenzie* v. *Everton and West Derby Permanent Benefit Building Society* (3), the question now under consideration seems to me to have directly arisen. There the question was whether the plaintiff, after a notice of withdrawal, was bound by altered rules, and the Court held that the plaintiff was bound. The judgment of *Huddleston*, B., contains a passage which seems to me to give the gist of the decision of the Court. He says: "Did she still continue to be a member of the society after the notice of withdrawal?"—and he answers the question in the affirmative.

Mr. *Daniel* says that this case only establishes that altered rules are binding when the alteration is of a comparatively slight nature, such as was the rule in question in that case regarding arbitration; but I find no such proposition in the judgment, nor can I see how, on principle, I can make the distinction contended for. The Court would have in each case to examine the subject to which the alteration applied, and to say whether it was material or trifling, and so binding or not binding. That would be to embark on a difficult course, and where would the Court draw the line? Mr. *Daniel* suggests it should at least be drawn at vested rights; but, as I have already said, the vested rights are subject to the still existing powers of altering the rules. In the cases relating to mortgages, the

(1) 22 Q. B. D. 373. (2) 22 Q. B. D. 381, n.
(3) 61 L. T. (N.S.) 680, 683.

alteration in the rules was substantial, and, so to speak, of a constitutional character; yet the Court held the new rules binding on the mortgagor although detrimental to him.

I hold, therefore, that the Plaintiff is bound by this altered rule, and I accordingly refuse the motion, but without costs.

Solicitors: *Cuddon & Co.; Skipper & Tucker.*

G. M.

In re A CONTRACT BETWEEN PECK AND THE SCHOOL BOARD FOR LONDON.

CHITTY, J.
1893
March 16, 17, 21, 22.

[1892 P. 1571.]

Vendor and Purchaser—Form of Conveyance—General Words—Easement—Right of Way—"Reputed to appertain or enjoyed"—Exception from Conveyance—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-ss.* 1, 2, 4.

Under a contract for the sale of land "with the appurtenances," the purchaser is only entitled to have such general words in his conveyance as he would have been entitled to before the *Conveyancing and Law of Property Act,* 1881, came into operation; and if the general words implied by sect. 6 of that Act are more extensive than the contract, the vendor is entitled to have them limited accordingly.

Barkshire v. *Grubb* (1), and *dictum* of *Fry,* L.J., in *Bayley* v. *Great Western Railway Company* (2), discussed and explained.

ADJOURNED SUMMONS.

The *School Board for London,* under their compulsory powers, served notice to treat in their usual form, upon one *Robert Peck,* for "all the lands and hereditaments situate in the parish of *Hackney,* in the county of *Middlesex,* of which the particulars are contained in the schedule hereto, with the appurtenances, and which said lands and hereditaments are particularly delineated and described in the plan delivered herewith."

The lands and hereditaments specified in the schedule and plan consisted of three houses fronting *Gainsborough Road, Hackney,* with an open plot of waste ground at the rear, and four

(1) 18 Ch. D. 616. (2) 26 Ch. D. 434, 457.

CHITTY, J.
1893
In re
A CONTRACT BETWEEN PECK AND THE SCHOOL BOARD FOR LONDON.

sheds at the further side of the open plot. This open plot of ground, which was covered with rough grass, was continued westward over other land of the vendor not included in the notice to treat, until some gates were reached which opened into a public road. This open plot of waste ground was not alleged to be a way of necessity, but it had been used as a way of convenience, by the tenants of the vendor and other persons, to and from the houses in *Gainsborough Road* and the sheds at the rear thereof.

The conveyance of this property, as submitted to the vendor and his mortgagee for execution, purported to make the vendor convey as beneficial owner, and contained no mention whatever of any right of way. The vendor contended that, if the conveyance was executed in its present shape, the general words implied by the *Conveyancing Act*, 1881, s. 6, sub-s. 2, would carry a right of way over the open land as "reputed to appertain to . . . or enjoyed with" the land and houses conveyed, and added the following words to the conveyance: "So nevertheless and provided that the grant and conveyance hereby made shall not be construed in any respect by way of creation or grant *de novo*, but so only as to pass by way of assignment the existing estates and interests of the parties thereto of the first and second parts respectively." The School Board objected to any such exception; but as the vendor insisted that he was entitled to have some words inserted in the conveyance to limit the effect of the implied general words, inasmuch as he had not purported to sell any right of way, and no right of way had been mentioned in the notice to treat, or allowed for in fixing the purchase-money, a summons was taken out by the School Board for the purpose of having the proper form of conveyance settled by the Court.

Byrne, Q.C., and *Whiteway*, for the School Board:—

We gave notice to treat for this property "with the appurtenances," and we have a right to a conveyance in the ordinary form, and to take such appurtenances as belong to the land sold without any exception. There is no exception in the contract, and we are entitled to have the benefit of the general words implied by the *Conveyancing Act*, 1881, s. 6, sub-s. 2.

We do not ask the Court to determine any question of right of way now, but only to say what form of conveyance we are entitled to under the contract. Before the *Conveyancing Act*, 1881, a purchaser was entitled to have the proper general words inserted in his conveyance; after the passing of the *Conveyancing Act*, on a contract for the sale of land, a purchaser is entitled to such a conveyance as a conveyance of "land" under the Act will give him.

[*Barkshire* v. *Grubb* (1); *Bayley* v. *Great Western Railway Company* (2); *Dart's* Vendors and Purchasers (3); *Davidson's* Precedents (4), were referred to.]

Farwell, Q.C., and *B. B. Rogers*, for the vendor:—

A contract to buy land "with the appurtenances" does not give the purchaser a right to a way of convenience over adjoining land of the vendor: *Bolton* v. *Bolton* (5). That was a decision before the *Conveyancing Act*, 1881; but we say that the *Conveyancing Act* was not intended to alter the rights of the parties to the contract; it was only meant to shorten conveyances, and to shew what general words would be implied in the conveyance, so far as a contrary intention is not expressed thereby. The implied general words "reputed to appertain to . . . or enjoyed with" the land conveyed will, in the absence of a contrary intention, pass this or any other rights of way there may be; and as no right of way was mentioned in the notice to treat, or allowed for in fixing the value, we are entitled to have some limit placed on the implied general words.

Byrne, in reply:—

Bolton v. *Bolton* is practically overruled by the more recent decision of *Bayley* v. *Great Western Railway Company*, where Lord Justice *Fry* (6) states the result of the authorities in a way which is inconsistent with his earlier decision in *Bolton* v. *Bolton*. *Barkshire* v. *Grubb* is also inconsistent with *Bolton* v. *Bolton*.

(1) 18 Ch. D. 616.
(2) 26 Ch. D. 434.
(3) 6th Ed. pp. 609, 610.
(4) 5th Ed. vol. i. p. 71.
(5) 11 Ch. D. 968.
(6) 26 Ch. D. 457.

CHITTY, J.
1893
In re A CONTRACT BETWEEN PECK AND THE SCHOOL BOARD FOR LONDON.

CHITTY, J. (after stating the question raised for his decision and the facts, continued):—

Now the contention of the School Board is, that they are entitled to have included in the conveyance all the general words found in the 6th section of the *Conveyancing Act* of 1881—that is to say, they argue that the vendor is not entitled to insert any words which would exclude any of the general words in the 6th section. The argument for the School Board on this point, when properly understood, is an argument that this section in the *Conveyancing Act* has altered contracts, and the rights that flow from contracts. In my opinion—and I hold a clear opinion upon the point—the 6th section has done nothing of the kind. The object of the 6th section, as is apparent from the language of the section itself, is to shew what general words are to be taken as included in a conveyance of land where the conveyance is otherwise silent. It is with the conveyance of land only that the Legislature is dealing, and not with the contract; and it is plain, to my mind, that neither party to a contract is entitled to have these general words included in the conveyance unless they are justified by the contract, and appropriate to the proved circumstances of the case. As the section itself states in express terms in sub-sect. 4, the section applies only, "if and as far as the contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained." The main object of the section is to shorten the conveyance. Now the words which are included in the 1st sub-section are words that were in general use among conveyancers before the Act passed. There was some variety in the forms used by different conveyancers; and, although this form was, perhaps, not universally adopted, it may be fairly said it was in common use; and the Legislature, thinking that such words would be appropriate in the great majority of cases, has enacted that a conveyance of land shall be deemed to include these things which are included in this 6th section, and it does nothing more. On examining the general words found in sub-sect. 1 of sect. 6, I find, restricting myself to "ways" only (for it is with regard to "ways" that the question arises), the language is such that it would convey ways reputed

to appertain to the land, or enjoyed with the land; and on the authorities, there is no question that the words "enjoyed with" would pass a way which did not exist at the time of the conveyance as of right, but was *de facto* enjoyed. I consider it is quite unnecessary now, after the numerous recent decisions, to quote authority upon that point. Now the School Board have declined to go into evidence, and I think they are within their right when they say that the Court has not to decide upon this summons what rights ought to pass under the conveyance, but only has to decide that the appropriate words should be inserted in the conveyance to give effect to the statutory contract. It is plain, however, that the Board is aiming at obtaining a grant, in some way or other, of a right of way over the portion of the open ground which is continued to the west of the open plot of ground included in the notice to treat. The vendors say, and I think rightly say, that the School Board have not exercised the power which they have of buying an easement over that ground, and that they, the vendors, are entitled to be protected against the insertion in the conveyance of anything that would operate by way of express grant, to carry such a right of way; and unquestionably the vendors would be in a worse position if the words implied by the 6th section of the statute, "ways enjoyed," were allowed to remain as part of the conveyance, than they would be if some limit were placed upon them by some appropriate words in the conveyance.

Now I have said that the notice to treat contained the word "appurtenances," which has a strict legal meaning, and nothing else. In the statutory form of conveyance under the *Lands Clauses Act* of 1845, which applies to this case, the general words run thus: "together with all ways, rights, and appurtenances thereto belonging." That form of conveyance is permissive only, and the School Board in this case are not bound to present their draft conveyance to the vendors in that form. But that is an indication on the part of the legislature of what was considered should pass with the conveyance of the land bought. Of course, I am speaking of an ordinary case where the contract, or the notice to treat, contains no special words.

Several authorities have been referred to. I shall content

CHITTY, J.
1893
In re A CONTRACT BETWEEN PECK AND THE SCHOOL BOARD FOR LONDON.

myself with mentioning one or two only. The first is a case of *Bolton* v. *Bolton* (1), before Sir *Edward Fry*. In that case there was an agreement to sell to the School Board the lands described in the schedule with their appurtenances. There was access shewn to the freeholds specified in the first schedule by two made roads—one leading to the west into a public road, and the other to the east, and the School Board insisted upon having the conveyance in a form substantially identical with the 1st sub-section of the 6th section of the *Conveyancing Act*. The vendors admitted that the School Board had a right to use one of these roads as a way of necessity, and relied on the well-known principle of law that, in reference to ways of necessity, the grantor had the right to point out the way, provided, of course, that it was a convenient one. But the School Board contended on that contract, and having regard to the surrounding circumstances, and especially to the fact of there being two made roads shewn, that they were entitled to a grant of way over both the roads, and Sir *Edward Fry* was permitted, by the shape which the argument took, to decide the actual question which the School Board in the case before me decline, so far as they can, to allow me to do, by making it a simple question of the right general words to be inserted in the conveyance. But Sir *Edward Fry*, dealing with the case fully, was of opinion that the School Board were not entitled to the special grant of way. He says (2): "In my view, therefore, the contract was for the conveyance of the premises with all that was appurtenant or appendant to them and nothing more." Now that case was decided before the *Conveyancing Act* came into operation. In my opinion the *Conveyancing Act* has made no difference; and that appears to me to be an authority in point—indeed, it is a stronger authority than is required because, in that case, there were two made roads by which access could be had to the property sold, whereas there is no made road, or anything that can be called a made road, shewn over the piece of ground to the westward of this open plot of ground.

Then the case of *Barkshire* v. *Grubb* (3), also before the same learned Judge, was a case which, when it is examined, appears to

(1) 11 Ch. D. 968. (2) 11 Ch. D. 970. (3) 18 Ch. D. 616.

be one on the construction of the agreement before him, and there he had also to decide the question of right. In regard to the contract of sale it was an executory one, and in construing such a contract the Court will have regard to the facts existing at the date of the contract. In determining how the conveyance ought to be framed, the Court could not exclude from its consideration the fact that the gravel path was actually used as the mode of access from the road to the cottages. Then working out the rights of the parties on that footing, he says that, in pursuance of such a contract as that, it would be right to insert "ways now used or enjoyed." But that decision turning, as it did, upon the contract itself, and the special circumstances of the case, is no authority affecting my decision.

The result is this—that I must take care that the general words inserted in the conveyance (for I think that will be the proper way of dealing with this case) are such as, on the one hand, will leave the School Board open to assert whatever rights they have, pursuant to this statutory contract, and, on the other hand, will protect the vendors against making them grant anything which they have not agreed to grant, and for which they have not been paid. To do this, I am of opinion that it will be necessary to exclude the operation of the 6th section of the *Conveyancing Act*; and then I think the right form will be to take words practically to the same effect as those that are to be found in the form of conveyance in the statute of 1845. If the purchasers desire to amplify those words, but keeping within the limits of them, and to put in hedges and ditches, and things of that kind, with regard to property of this sort, I do not see that there would be any special objection on the vendor's part; but substantially I hold that words which would carry the appurtenances would carry all that the School Board are entitled to.

Mr. *Byrne*, in his very excellent argument, did cite to me a passage from Sir *Edward Fry's* judgment in *Bayley* v. *Great Western Railway Company* (1), and I think his argument tended to this—that Sir *Edward Fry* had overruled himself, or made use of *dicta* which tended to shake the authority of his own decision in *Bolton* v. *Bolton* (2). I do not think that is the effect

(1) 26 Ch. D. 457. (2) 11 Ch. D. 968.

CHITTY, J.
1893
In re
A CONTRACT BETWEEN PECK AND THE SCHOOL BOARD FOR LONDON.

of anything that the learned Judge uttered in the case I have mentioned; but what he did, in effect, say was that, where there was a visible road, probably the mere grant of the land itself would carry a right of way along that visible road. If that be a correct proposition of law, about which I am not called upon to express any opinion, and which Sir *Edward Fry* did not state as having ever been decided, but spoke of as a probable result of the grant, the effect of the words in the conveyance, as I think it should stand, will still give the School Board the benefit of that *dictum*, and the opportunity of turning that *dictum* into a decision, and an authority, if they can prevail upon any Court hereafter to adopt it in reference to the actual state and condition of this property, and the surrounding circumstances at the time of the grant. I propose not to encourage the School Board to raise the question, and I do not think it forms any part of my function on the present occasion to discourage them from raising it beyond saying what I have said, and which I consider to be material to my actual decision. The parties can now frame the conveyance in accordance with what I have said. I should think the words "appurtenances thereto belonging" would be quite enough; but I do not want to exclude the School Board from having the usual general words, but they are not entitled to have the words "reputed to appertain" or "enjoyed with or reputed or known as part" of the land conveyed.

The School Board must also pay the costs of this summons, because although the conveyance does not stand in exactly the way the vendor framed it, yet substantially the vendor has succeeded.

[The conveyance was subsequently ordered to be settled by adding a proviso excluding the operation of sect. 6 of the *Conveyancing Act*, 1881, and inserting the appropriate general words from sub-sect. 2 down to the words "appertaining," and then concluding "or appurtenant to the said land."]

An appeal from this decision was presented, but was subsequently withdrawn.

Solicitors: *C. E. Mortimer; Crowders & Vizard.*

W. C. D.

In re TUCKER.
TUCKER *v.* TUCKER.

NORTH, J.

1893
March 4.

[1892 T. 285.]

Annuity—Charge on Corpus—Settled Estate—Raising Arrears by Sale or Mortgage of Estate.

When an annuity charged upon the *corpus* of settled real estate is in arrear the Court has power to order the arrears to be raised by sale or mortgage of the estate, though the making of such an order is a matter, not of course, but of discretion.

Graves v. *Hicks* (1), and *Taylor* v. *Taylor* (2) considered.

SUMMONS by *William Henry Tucker*, asking that he might be at liberty to raise the amount of the arrears of certain rent-charges, due to himself and four other persons respectively, the rent-charges being by a codicil of *Henry Tucker* charged upon and issuing out of an estate called the *Hinton* estate.

By a codicil dated the 4th of August, 1874, the testator devised to his trustees five yearly rent-charges—viz., one of £40 during the life of *Ann Hill*, one of £150 during the life of *Annie Parris*, one of £50 during the life of *Elizabeth Parker Gillmore*, one of £50 during the life of *Jane Mead*, and one of £300 during the life of *William Henry Tucker* (the Plaintiff). And the testator directed that the rent-charge of £300 should be held upon certain trusts for the benefit of the Plaintiff, and that each of the other four rent-charges should be held upon trust for the person during whose life the same was thereinbefore devised.

The testator directed that the five rent-charges should respectively be charged upon and issuing out of his *Hinton* estate exclusively, and should respectively be paid quarterly. And he empowered his trustees "by distress, and also by entry upon and perception of the rents and profits" of his *Hinton* estate, or any part thereof, to recover payment of all or any of the rent-charges when in arrear for twenty-eight days. And, "subject to and charged with the five several rent-charges, and the remedies for recovering payment thereof respectively," the testator devised his

(1) 11 Sim. 551. (2) Law Rep. 17 Eq. 324.

NORTH, J.
1893
In re TUCKER.
TUCKER *v.* TUCKER.

Hinton estate to the use of his wife and her assigns during her life; with remainder to the use of *Henry Emilius Tucker* and his assigns during his life; with remainder to the use of his child, if only one, or all his children, if more than one, who, either in his lifetime or after his decease, should (being a son or sons) attain the age of twenty-one years, or (being a daughter or daughters) attain that age or marry, and his, her or their respective heirs and assigns, and, if more than one, in equal shares, as tenants in common. And if there should be no child of *Henry Emilius Tucker* who should (being a son) attain the age of twenty-one years, or (being a daughter) attain that age or marry, (subject to the foregoing uses) the testator devised his *Hinton* estate to the uses, upon the trusts, and subject to the powers, provisoes, and declarations by and in his will limited, declared, and contained respecting his freehold estate in the counties of *Berks* and *Wilts* respectively, but not so as to increase or multiply charges or powers of charging.

By the testator's will his estate in *Berks* and *Wilts* was devised to the use of his wife and her assigns during her life; with remainder to the use of *Ernest Alfred Tucker* and his assigns during his life; with remainder to the use of every son of *Ernest Alfred Tucker* and his issue male in succession; and for default of such issue to the use of *Henry Emilius Tucker* and his assigns during his life; with remainder to the use of every son of *Henry Emilius Tucker* and his issue male in succession, so that every elder son and his issue male should be preferred to and take before every younger son and his issue male, and so that every such son who should be begotten in the testator's lifetime should take an estate for his own life, with remainder to his first and every subsequent son successively, according to seniority, in tail male, and so that every son of *Henry Emilius Tucker* who should be begotten after the decease of the testator should take an estate in tail male; and in default of such issue remainders over.

The testator died on the 17th of January, 1875. His widow died on the 26th of July, 1891. Since her death the rents of the *Hinton* estate had been insufficient to satisfy the five rent-charges, and a considerable amount of arrears was due to each of the annuitants. *Ernest Alfred Tucker* had no children.

The Defendants were, the trustees of the will and codicil; *Henry Emilius Tucker* and his four infant children; and *Ernest Alfred Tucker*.

S. Hall, Q.C., and *H. Terrell*, for the Plaintiff:—

The annuities are charged on the *corpus* of the estate: *Birch* v. *Sherratt* (1); *In re Mason* (2). That being so, and the rents of the estate being far from sufficient to pay the annuities, and there being no prospect of any improvement, the annuitants are entitled to have the arrears and the future payments raised by a sale or a mortgage of a sufficient part of the estate: *Cupit* v. *Jackson* (3); *White* v. *James* (4); *Todd* v. *Bielby* (5); *Hall* v. *Hurt* (6).

[NORTH, J., referred to *Picard* v. *Mitchell* (7).]

Graves v. *Hicks* (8) is inconsistent with the other cases, if it was intended to decide that in no case can the arrears of an annuity, which is charged upon a settled estate, be raised by sale or mortgage of the estate. But *Graves* v. *Hicks* is explained in *White* v. *James*. The ground of the decision in *Taylor* v. *Taylor* (9) was that the annuity was not charged upon *corpus*. No doubt in *Horton* v. *Hall* (10), Vice-Chancellor *Hall* gave a different explanation of *Taylor* v. *Taylor*; but, if he meant that an annuity which is charged on a settled estate can under no circumstances be raised by sale or mortgage of the estate, his view of the law was erroneous. In *Pearson* v. *Helliwell* (11) the true explanation of *Taylor* v. *Taylor* is given.

It can make no difference, as regards the right of the annuitant, whether the estate which is charged is given, subject to the annuity, to one person absolutely, or to a number of persons in succession.

W. C. Fooks, for the trustees of the will and the other annuitants.

(1) Law Rep. 2 Ch. 644.
(2) 8 Ch. D. 411.
(3) 13 Price, 721.
(4) 26 Beav. 191.
(5) 27 Beav. 353.
(6) 2 J. & H. 76.
(7) 14 Beav. 103.
(8) 11 Sim. 551.
(9) Law Rep. 17 Eq. 324.
(10) Ibid. 437.
(11) Law Rep. 18 Eq. 411.

NORTH, J.
1893
In re TUCKER.
TUCKER *v.* TUCKER.

Herbert Brown, for mortgagees of *Henry Emilius Tucker*, and for his infant children:—

It is doubtful whether a charge on the *corpus* is created. But, if it is, *Graves* v. *Hicks* (1), and *Taylor* v. *Taylor* (2), are very like the present case, and shew that the annuitants are not entitled to have the arrears raised by sale or mortgage. *Horton* v. *Hall* (3) is to the same effect. If the Court has a discretion to order the arrears to be raised by sale or mortgage, it will not, under the circumstances, exercise its discretion in that way.

NORTH, J.:—

The first question is, whether the annuities are charged on the *corpus* of the *Hinton* estate or only upon the income; and, if they are charged upon the *corpus*, the second question is, whether the arrears ought to be raised by sale or mortgage of the estate. [His Lordship read the codicil, and continued:—] I cannot doubt for a moment that the annuities were intended to be a charge upon the estate, as distinguished from a charge which is intended to be paid and kept down out of income only. If any authority is wanted for this construction (I do not think it is), *Birch* v. *Sherratt* (4), *In re Mason* (5), and *Cupit* v. *Jackson* (6) are in favour of it. But, independently of authority, I should have come to the conclusion that the annuities are a charge upon the *corpus* of the estate. In *Taylor* v. *Taylor*, the language of the will was not nearly so strong as here; still I cannot see how that decision is consistent with *Birch* v. *Sherratt*. But *Taylor* v. *Taylor* is a very unsatisfactory case. According to the report, it appears to decide that the annuity was not a charge upon *corpus*, while in *Horton* v. *Hall*, decided about a fortnight later by Vice-Chancellor *Hall*, who had decided *Taylor* v. *Taylor*, he gave a totally different account of *Taylor* v. *Taylor*. I have no doubt that in the present case, the *corpus* of the estate is charged with the annuities.

Ought then the estate to be sold or mortgaged for the purpose of raising the arrears and the future payments? The income of

(1) 11 Sim. 551.
(2) Law Rep. 17 Eq. 324.
(3) Ibid. 437.
(4) Law Rep. 2 Ch. 644.
(5) 8 Ch. D. 411.
(6) 13 Price, 721.

the estate was formerly quite sufficient to pay the annuities; but owing to various causes, the income has become reduced from over £1000 a year to about £288, and the annuities amount to £590 a year. What prospect is there of escaping from this difficulty? I fully accede to the view that, even if an annuity is charged upon *corpus*, and is in arrear, it is not a matter of course that it is to be raised at once by a sale or a mortgage of the estate. It is a matter of discretion, and the Court will not always at once impose on the persons interested in the estate the expense of an immediate sale or mortgage of part of it. But here this state of things has existed for a considerable time, and the difference between the income and the amount of the annuities is increasing, and there is nothing to indicate any probability that the depreciation in the value of land will be removed at an early date. There is no prospect of such an increase in the rental of the estate as will enable the future payments of the annuities to be kept down and the arrears to be paid off. Under these circumstances, it seems to me that I ought to enable the annuitants to receive that to which they are entitled, if the law allows me to do so. I think the authorities clearly show that it does.

In *Cupit* v. *Jackson* (1), an annuity was by a marriage settlement charged on real estate of the wife's father, the annuity being payable to the husband during his life. Powers of entry and distress for the recovery of the annuity and all arrears were given. After the death of the father the executrix of the husband filed a bill against the devisee of the real estate to enforce the payment of arrears of the annuity, due at the time of the husband's death, by means of a sale or mortgage of a sufficient part of the real estate. A decree was made accordingly, and Chief Baron *Alexander* said (2): "The annuity being a charge and an incumbrance on a real estate itself, and not merely a demand against the owner of the estate, I apprehend the Court might, if necessary, raise the arrears out of the estate by sale or mortgage; and, in practice, that is a sufficient equitable ground of application to a Court of Equity for relief, because it is out of the power of a Court of Law. The rendering legal remedies

(1) 13 Price, 721. (2) 13 Price, 733.

NORTH, J.
1893
In re TUCKER.
TUCKER *v.* TUCKER.

available forms part of the jurisdiction of Courts of Equity. Bills for satisfying incumbrancers out of estates have been very frequently acted upon."

In *Graves* v. *Hicks* (1), an annuity was charged by will on an estate, which, subject to the annuity, was devised in strict settlement. The rents were insufficient to pay the annuity, and it had become greatly in arrear. Vice-Chancellor *Shadwell*, notwithstanding this, refused to direct an immediate sale or mortgage of the estate for the purpose of paying the arrears, the annuitant being still alive. He said (2): "No case has been produced as an authority for such a proceeding; and my opinion is that, unless the Court finds it necessary to make a decree for the sale of the estate for some other purpose, there is no ground whatever for making a direction that the amount of those arrears (which, it is true, are now ascertained, but which will be liable, very probably, in the course of a succession of years, to fluctuate) shall be raised in the manner proposed; for I do not understand that it is necessary now to give any direction for the sale or mortgage of the real estate for any other purpose. My opinion, therefore, is that all that can be done at present is to let the matter go on; and if the future rents increase, the arrears will be diminished, and, for aught I know, may be ultimately paid."

If that was intended to be a decision that the Court cannot at any time direct a sale or mortgage of a settled estate for the purpose of raising arrears of an annuity which is charged upon the estate, I should like to know what the use is of a charge upon the *corpus* of the estate. But there have been a number of cases since *Graves* v. *Hicks*, in which that view was not adopted by the Court. The first is *Picard* v. *Mitchell* (3). There a testator devised real estate, subject to and chargeable with the payment of some annuities, upon certain trusts. The annuities were greatly in arrear, and it was asked that the real estate might be sold for the purpose of raising the amount. Sir *J. Romilly*, M.R., said: "I think the charge in the first instance is sufficient to make the whole property liable for payment of the annuities, and the plaintiff is therefore entitled to a sale. Take a direction

(1) 11 Sim. 551. (2) 11 Sim. 555.
(3) 14 Beav. 103, 105.

for sale of the real estate." The only case which appears to have been cited in the argument there is *Foster* v. *Smith* (1), which was cited as an authority for holding that the annuities were not payable out of the *corpus* of the estate. Neither *Cupit* v. *Jackson* (2) nor *Graves* v. *Hicks* (3) was cited, and, therefore, the decision carries less weight than it would have done if those cases had been cited. But still it contains a clear expression of the view of Sir *J. Romilly*. Then there is *White* v. *James* (4). In that case land, of which the defendant was the owner in fee, was subject to a rent-charge granted to the plaintiff, with powers of distress and entry. The rent-charge was in arrear. There were twenty other concurrent rent-charges, with like remedies, and there was nothing to distrain upon. Sir *J. Romilly*, M.R., directed a sale of a sufficient part of the land to pay the arrears and costs. He said (5): "I think I am bound by the case of *Cupit* v. *Jackson*, and that I cannot avoid following it, notwithstanding any observations in the text-books as to the inconvenience. The Vice-Chancellor of *England*, in *Graves* v. *Hicks*, thought that the Court would not, as matter of discretion, raise the arrears of a rent-charge by a sale, until there was a tenant in fee simple in possession of the estate charged. He said the arrears must be paid some time or other, but that he had in that case no *constat* that they might not be paid out of the future rents. Here there are perpetual rent-charges issuing out of the fee vested in the defendant. When are the arrears to be paid? In ten or even twenty years hence it will be exactly the same question, and the observation of the Vice-Chancellor of *England* as to the fee simple falling into possession has occurred. Therefore the future state of circumstances cannot be different from the present. Here is a series of deeds creating twenty-one rent-charges, and it is shewn that they cannot be paid out of the rents and profits. Am I to allow the owner to leave them unpaid, and the land to lie waste? If one grantee should attempt to make a distress, it would make the property unavailable for the future payment of the rent-charges; for the tenants would

(1) 1 Ph. 629.
(2) 13 Price, 721.
(3) 11 Sim. 551.
(4) 26 Beav. 191.
(5) 26 Beav. 194.

NORTH, J
1893
In re TUCKER. TUCKER *v.* TUCKER.

leave, the property would become uninhabited, and of no value to any one. If therefore it cannot be made available by letting, it must be by sale."

The next case is *Todd* v. *Bielby* (1), which, as it is reported, is not very much in point. Sir *J. Romilly*, M.R., held that the *corpus* of an estate charged by will with annuities being insufficient to pay the arrears, the produce of the estate must be divided among the annuitants in proportion to the values of their respective annuities. But it appears incidentally from the report that an order had been made for the sale of the real estate, and in a note to the report (2) it is mentioned that, when the order for sale was made, the Master of the Rolls said: "Take an order for sale; for, if that be not done, a fraction of the estate must be sold annually to pay the arrears." Then in *Hall* v. *Hurt* (3) a decree was made for the sale of a settled estate for the purpose of paying the arrears of a rent-charge which could not otherwise be satisfied. Vice-Chancellor *Wood* said (4): "The point, as to the arrears of the annuity, was discussed in *Cupit* v. *Jackson* (5) and *Graves* v. *Hicks* (6), which are somewhat conflicting; but, even in the latter case, I do not find that the Vice-Chancellor absolutely denies the right to a sale in any case. He intimates a very strong opinion, that the Court ought not to make such a decree except in a case of necessity; but he does not seem to question the proposition, that, where an estate is limited to the use that a certain person shall receive an annuity, the Court has authority to say, that he shall receive it in the most beneficial way, namely, by means of a sale, if necessary, to raise the arrears. In *White* v. *James* (7) the Master of the Rolls rested his judgment a good deal on the circumstance, that the annuity there was a fee farm rent, which must last for ever. But I think, that, looking at the principle on which the Vice-Chancellor acted in *Graves* v. *Hicks*, the present case is one in which there can be no difficulty about ordering a sale. A sale is the only mode in which the property can be made available; and, having regard to *Cupit* v.

(1) 27 Beav. 353.
(2) Ibid. 354, n.
(3) 2 J. & H. 76.
(4) 2 J. & H. 78.
(5) 13 Price, 721.
(6) 11 Sim. 551.
(7) 26 Beav. 191.

Jackson (1) and to the decision of the Master of the Rolls, I think the facts of this case are abundantly sufficient to justify me in ordering a sale to raise the arrears of this annuity."

The last case to which I will refer is *Pettinger* v. *Ambler* (2). There *John Benn* had conveyed freeholds to trustees in fee, in trust for himself for life, with remainder to Mrs. *Ambler* for life, with remainder upon such trusts as he should by his will appoint, and in default upon trust for Mrs. *Ambler* in fee. The deed gave to the trustees powers to lease and to sell and exchange. Afterwards by his will the settlor gave to the plaintiff during her life an annuity of £100, to be raised out of his freehold property. The plaintiff's annuity had fallen into arrear, and she claimed to have the reversion expectant on the death of Mrs. *Ambler* sold, and the produce applied in paying the arrears and the future payments of the annuity. The claim was resisted on the ground that a sale would render ineffectual the powers vested by the settlement in the trustees. But the Master of the Rolls made the order asked for, and it is clear that he thought the annuitant entitled to a sale. I need not pursue the matter any further. I have already said that I think *Taylor* v. *Taylor* (3) a very unsatisfactory case, by reason of the way in which Vice-Chancellor *Hall*, who decided it, referred to it in the later case of *Horton* v. *Hall* (4).

In my opinion the annuitants are entitled to have the arrears of their annuities raised by means of a sale or a mortgage of a sufficient part of the estate.

Solicitors: *Rooke & Sons; Hughes & Sons.*

(1) 13 Price, 721.
(2) 34 Beav. 542.
(3) Law Rep. 17 Eq. 324.
(4) Ibid. 437.

W. L. C.

NORTH, J.
1892
Nov. 15.
1893
March 18

In re BEDINGFELD AND HERRING'S CONTRACT.

[1892 B. 3248.]

Vendor and Purchaser—Settlement of Real Estate—Power of Sale by Trustees with Consent of Tenant for Life—Bankruptcy of Tenant for Life—Sale by Trustees—Concurrence of Trustee in Bankruptcy.

A settlement of real estate contained a power of sale by the trustees, with the consent of the tenant for life. The tenant for life incumbered his life estate, and was adjudicated a bankrupt, and the trustees afterwards entered into a contract to sell the land:—

Held, that the consent of the tenant for life to the sale could still and must be given; but that a good title could not be made without the concurrence also of the incumbrancers and of the trustee in the bankruptcy.

SUMMONS under the *Vendor and Purchaser Act*, 1874, by a purchaser of real estate, asking for the determination of the question whether a good title to the property had been shewn by the vendors.

By a voluntary settlement, dated the 3rd of December, 1878, and made between *Henry William Michael Nevill* of the one part, and Messrs. *Bedingfeld & Norris* of the other part, certain funds were vested in the latter, upon trust to pay the income to *Nevill* for his life, and after his death upon certain trusts for the benefit of his wife and children. The settlement empowered the trustees, at the request in writing of *Nevill*, to invest the trust funds in the purchase of land, to be conveyed to and vested in and held by them upon trust, with the consent in writing of *Nevill* during his life, to sell and dispose of the same, and to hold the proceeds on the trusts of the settlement; and it was directed that until sale the rents and profits should be paid to the persons who would be entitled to the income of the investment of the purchase-money, if a sale had actually taken place.

In the year 1887, the property to which the summons related belonged to *Nevill*, and the trustees invested part of the trust funds in purchasing it from him, and it was conveyed to them accordingly. In June, 1892, the trustees put up the property for sale by auction, and *Herring* became the purchaser. The 7th

condition of sale stated the circumstances under which *Nevill* had himself been the vendor to the trustees, and provided that no objection should be made to the title on account of those circumstances, nor should the concurrence of *Nevill*, or of any of the persons beneficially interested under the settlement, in the conveyance to the purchaser, be required, but that the written consent of *Nevill* to the sale would be handed over to the purchaser on completion.

While the vendors' title was being investigated the purchaser's advisers became aware that *Nevill* had created some incumbrances upon his life interest, and had also become a bankrupt; and they required that the incumbrancers and the trustee in the bankruptcy should consent to the sale, and insisted that without those consents a good title could not be made. The vendors' advisers denied the right of the purchaser to require the concurrence of those persons, and positively refused to procure their consent.

This summons was then taken out by the purchaser.

S. Hall, Q.C., and *Micklem*, for the purchaser:—

The 7th condition of sale does not preclude the purchaser from requiring the concurrence of the incumbrancers on the life estate and of the trustee in the bankruptcy of the tenant for life. This is now conceded by the vendors.

We admit that the power of the tenant for life to consent to the sale is not extinguished by reason of the incumbrances upon his life estate or of his bankruptcy; but still the power cannot be exercised to the detriment of the incumbrancers or of the trustee: *Badham* v. *Mee* (1); *Jones* v. *Winwood* (2); *Hole* v. *Escott* (3); *Lord Leigh* v. *Lord Ashburton* (4); *Morgan* v. *Rutson* (5); *Warburton* v. *Farn* (6); *Hurst* v. *Hurst* (7); *Holdsworth* v. *Goose* (8); *Long* v. *Rankin* (9); *Eisdell* v. *Hammersley* (10); *Simpson* v. *Bathurst* (11); *Alexander* v. *Mills* (12); *In re Cooper* (13).

(1) 1 My. & K. 32.
(2) 3 M. & W. 653; 10 Sim. 150.
(3) 4 My. & Cr. 187.
(4) 11 Beav. 470.
(5) 16 Sim. 234.
(6) Ibid. 625.
(7) 16 Beav. 372.
(8) 29 Beav. 111.
(9) *Sugden* on Powers, 8th Ed. p. 895.
(10) 31 Beav. 255.
(11) Law Rep. 5 Ch. 193.
(12) Ibid. 6 Ch. 124.
(13) 27 Ch. D. 565.

NORTH, J.
1893
In re BEDINGFELD AND HERRING'S CONTRACT.

[*Cozens-Hardy*, Q.C., for the vendors, referred to *Walmesly* v. *Butterworth* (1).]

The persons who are entitled to the estate *in specie* during the life of the tenant for life cannot be deprived of it without their consent. Your Lordship's decision in *Hardaker* v. *Moorhouse* (2) is distinguishable. The power there was to appoint new trustees of a settlement, and the beneficial interest of the assignee of the tenant for life would not be affected by an exercise of the power.

Some provisions of the *Settled Land Act*, 1882, have by analogy a bearing on the present case. Sect. 50 of that Act provides, by sub-s. 1, that the powers under the Act of a tenant for life remain exerciseable by him after and notwithstanding any assignment of his estate or interest under the settlement; but by sub-sect. 3 this is to be without prejudice to the rights of any assignee for value of the estate or interest of the tenant for life, and in that case, the assignee's rights shall not be affected without his consent. And in *In re Sebright's Settled Estates* (3) the Court refused to order, under sect. 15, a sale of a mansion-house, when the tenant for life had mortgaged his life interest to its full value, without the consent of the mortgagees, *Cardigan* v. *Curzon-Howe* (4).

Cozens-Hardy, Q.C., and *Mulligan*, for the vendors:—

A good title can be made without the concurrence of the incumbrancers or of the trustee in the bankruptcy. *Walmesly* v. *Butterworth* and *Holdsworth* v. *Goose* (5) are really authorities in favour of the vendors. They shew that the power of the tenant for life to consent to the sale is not extinguished. In *Simpson* v. *Bathurst* (6) the question was whether, after a tenant for life had mortgaged his life interest and had become bankrupt, a power which he had under the settlement to renew leases for lives and take fines on renewals was extinguished or suspended, and it was held that the power might still be exercised by him

(1) *Coote* on Mortgage, 3rd Ed. App. 572; 4 L. J. (N.S.) (Ch.) 253.
(2) 26 Ch. D. 417.
(3) 33 Ch. D. 429.
(4) 40 Ch. D. 338.
(5) 29 Beav. 111.
(6) Law Rep. 5 Ch. 193.

with the concurrence of the mortgagee and of the assignee in the bankruptcy. If in that case the tenant for life could have exercised the power without their concurrence, he would have been able to put the fines into his pocket, and he would thus have derogated from his own grant. A similar observation applies to *In re Cooper* (1). In the present case there would be no derogation from the grant; the power is intended for the benefit of all the persons interested under the settlement, and the exercise of it cannot injure either the mortgagees or the trustee in the bankruptcy.

S. Hall, in reply.

1893. March 18. NORTH, J. (after stating the facts as above, continued):—

The contention of the vendors was partly rested, in the first instance, on the 7th condition of sale. But that condition was framed for a totally different purpose. It was intended to preclude any objection upon the ground that the person who was entitled to call upon the trustees to purchase was himself the vendor to them, and for that object it was clear and efficient. But, in my opinion, it would have been impossible to take advantage of it to defeat an objection arising out of a subsequent alienation (not disclosed in the conditions) of the vendor's life interest in the purchased property, if, but for the condition, the objection would have been well founded, and Mr. *Cozens-Hardy*, apparently taking the same view, did not press that objection.

Upon the main question I think it clearly settled by a long course of authorities that, if an owner of a limited interest, with power of selling, or requesting, or directing, or consenting to, a sale, disposes of his interest, the power is not extinguished, but is still capable of being exercised by him, so far as its exercise does not derogate from, or interfere with, his previous disposition. I do not think it necessary to refer to any earlier case than *Jones* v. *Winwood* (2), where an estate was settled to the joint appointment of husband and wife, and in default to the use of the husband and wife in succession for life (with intervening remainders to

(1) 27 Ch. D. 565. (2) 3 M. & W. 653.

NORTH, J.
1893
In re BEDINGFELD AND HERRING'S CONTRACT.

trustees to preserve contingent remainders), with successive remainders to the sons and daughters in tail, and to the husband in fee simple. In 1824 the husband became insolvent, and, on his discharge from prison, he bargained and sold all his real and personal estate to the provisional assignee, who subsequently conveyed it to the plaintiff *Jones*. In 1828 the husband and wife, in exercise of their joint power, appointed the property to *Brown* in fee. Upon a subsequent sale by *Jones*, *Brown* and the husband to the defendant *Winwood*, the latter objected to the title, upon the ground that the conveyance by the husband had destroyed the joint power, and in an action commenced against *Winwood* for specific performance the Court of Exchequer decided, on a case sent by the Court of Chancery for their opinion, that the joint power had not been determined, and had been validly exercised, but that its exercise did not affect the husband's original interest (viz., his life estate and ultimate remainder in fee), which had been previously conveyed away by him, as he could not, by exercising his power, derogate from his own conveyance. This decision was adopted and confirmed by Vice-Chancellor *Shadwell*, and specific performance, with costs, was decreed against the purchaser (1). This case has never been dissented from, but has often been adopted and followed. In *Hole* v. *Escott* (2) the circumstances were very similar, and it was held that a husband could not join his wife in exercising a power of appointment so as to interfere with the rights of a person who had purchased his life estate and his ultimate remainder in fee from the assignees in his bankruptcy. In *Warburton* v. *Farn* (3) trustees of a money settlement had power to invest the trust funds in land, and afterwards to re-sell the land, with the consent of the tenant for life. After a purchase of land had been made by the trustees the tenant for life sold his life interest. It was held that that alienation did not deprive him of the power of consenting to a subsequent re-sale by the trustees. It was clear that the power was not destroyed, but was still subsisting, and, though it could not be exercised so as to prejudice the rights of the purchaser of the tenant for life's interest, still, as the convey-

(1) 10 Sim. 150. (2) 2 Keen, 444; 4 My. & Cr. 187.
(3) 16 Sim. 625.

ance to the purchaser expressly recognised the continuance of the right of the tenant for life to consent to a sale, and as, moreover, the purchaser of the life interest offered to concur in the sale by the trustees, specific performance was enforced against the purchaser from them. In *Hurst* v. *Hurst* (1) a tenant for life, with power of charging portions, mortgaged his life interest, and covenanted not to exercise that power. He did subsequently exercise it in favour of persons who had notice of the mortgage, and it was held that the power was well exercised, but that the portioners could only come in behind the mortgagee. In *Eisdell* v. *Hammersley* (2) it was held that a power in trustees of a settlement to sell real estate, with the consent of the husband and wife, successive tenants for life, was exerciseable after the husband's bankruptcy by the trustees with the consent of the tenants for life, and the assigns of the husband's interest, all of whom were willing to concur. In *Simpson* v. *Bathurst* (3) a tenant for life had power to renew leases for lives, taking for his own benefit the fines on renewals. He first mortgaged his life interest, and afterwards became bankrupt. It was decided that the power of renewal was still continuing, but that it could only be exercised with the concurrence of the mortgagee and of the trustee in the bankruptcy. In *Alexander* v. *Mills* (4) trustees of a settlement had power to sell real estate, at the request and by the direction of the tenant for life, who was also the owner of the ultimate reversion in fee. After he had absolutely conveyed away his whole interest for value, the trustees sold the property under their power, at the request of both the tenant for life and his alienee, to a purchaser who objected to the title. Lord *Romilly*, M.R., held that the power was destroyed, and incapable of being exercised by reason of the alienation. The Court of Appeal held that the power was not destroyed, but that it existed and could still be exercised with the concurrence of the alienee. In *Hardaker* v. *Moorhouse* (5) I expressed a doubt whether the concurrence of the alienee was a material part of the decision. Upon further consideration, I think it was. But

(1) 16 Beav. 372.
(2) 31 Beav. 255.
(3) Law Rep 5 Ch. 193.
(4) Ibid. 6 Ch. 124.
(5) 26 Ch. D. 417.

NORTH, J.
1893.
In re BEDINGFELD AND HERRING'S CONTRACT

that case has no bearing on the present. Lastly, in *In re Cooper* (1), trustees had, with the consent of a tenant for life, a power of advancement in favour of a child, which they wished to exercise, and it was held that the power of consenting was not indeed extinguished by the bankruptcy of the tenant for life, but that it could not be exercised without the consent of the trustee in his bankruptcy.

In opposition to this series of decisions, Mr. *Cozens-Hardy* relied on two cases: *Walmesly* v. *Butterworth* (2) and *Holdsworth* v. *Goose* (3). The plaintiff in *Walmesly* v. *Butterworth* was, under a settlement, tenant for life of real estate, with remainders over. The trustees had a power of sale at his request and by his direction. The tenant for life first mortgaged his life estate, and afterwards contracted to sell part of the estate to the defendant, who was a willing purchaser, but objected that the power of sale was extinguished by the alienation, and that the defect could not be cured by a reconveyance by the mortgagee before sale, or by the mortgagee's joining in the conveyance to the purchaser, either of which courses the mortgagee was willing to take. The Court decided (as I understand the report) that the power was not extinguished, and that a good title could be made in the way proposed. But the only question there was, whether a title could be made even with the assistance of the mortgagee. It was neither decided, nor suggested, that the consent of the mortgagee (which the vendor offered to procure) was unnecessary, or could be dispensed with, nor that a good title could be made without his concurrence, and, unless the case goes that length, it does not help the present vendors.

In *Holdsworth* v. *Goose* the facts were very similar to those in the last case. There was a settlement of land on a husband for life, with a limitation over on his parting with his interest, with remainder to the wife for life, with remainders to the children of the marriage, and there was a power for the trustees to sell the land, at the request and by the joint direction of the husband and wife, during their joint lives. The husband afterwards became bankrupt, and subsequently the trustees, upon the joint

(1) 27 Ch. D. 565. (2) 4 L. J. (N.S.) (Ch.) 253.
(3) 29 Beav. 111.

request of the husband and wife, sold the land to the defendants. His advisers objected to the title. All parties, including the purchaser, were anxious to complete; and the assignees of the husband offered to give a request in writing to the trustees to exercise the power, or to join in the conveyance. A special case stated for the opinion of the Court raised two questions, (1.) whether the power was or was not extinguished by the bankruptcy; and (2.) whether the request and direction given by the husband and wife were or were not sufficient to enable the trustees to exercise the power, and whether they could, either with or without the consent and direction of the assignees, make a good title and effectually convey to the defendant. Sir *J. Romilly*, M.R., held that the power of assenting to the sale remained; that the case was exactly like *Walmesly* v. *Butterworth* (1); and that a sale by the trustees, at the request and by the direction of the husband and wife, with the consent of the assignees in the bankruptcy, would give a perfect title to the purchaser; and he added that the first question must be answered in the negative, and the second in the affirmative.

The remarks which I have made as to *Walmesly* v. *Butterworth* apply to this case also. But Mr. *Cozens-Hardy* contended that it is an authority in his favour, because the second question and the answer to it expressly affirm that a good title could be made either with or without the concurrence of the assignees. This criticism on the language is correct; but there is no substance in it. The Master of the Rolls expressly said that the sale "with the consent of the assignees" would give a perfect title. They did consent, and were anxious that the sale should go through. The question whether their concurrence could be dispensed with, or was immaterial, never arose, nor was argued or decided, and the argument founded upon the literal construction of the very words of the second question and the answer to it is of no weight.

Applying the authorities to the present case, the trust property is now land, to the rents and profits of which the incumbrancers and the trustee in the bankruptcy of the tenant for life are entitled. It is proposed to convert the land into money, and

(1) 4 L. J. (N.S.) (Ch.) 253.

NORTH, J.
1893
In re BELDINGFELD AND HERRING'S CONTRACT

to substitute the income arising from the investment of the net proceeds of sale for the rents and profits. For this the consent in writing of the tenant for life is necessary. His giving that consent would clearly affect the interests which he, or the law acting for him, has created; and this cannot be done without derogating from his dispositions thus made. Under these circumstances, I think it clear that the requisitions have not been sufficiently answered, and that the concurrence in the sale of the incumbrancers and of the trustee in the bankruptcy of the tenant for life is essential, and, as the vendors have declined to procure the consent of those persons, they must pay the costs of this summons.

Solicitors: *Williamson, Hill & Co.*, agents for *H. E. B. Rackham, Norwich; Norris & Norris.*

W. L. C.

NORTH, J.
1893
March 23, 25.

In re WILSON.
WILSON *v.* HOLLOWAY.

[1892 W. 3993.]

Real Estate—Conversion—Partnership.

The principle regulating the devolution of land held for a partnership or other common object discussed.

An interest in land held by two persons for a common object held to devolve as real estate.

THIS was an originating summons to determine, among other questions arising in the administration of the estate of *Andrew Wilson*, the testator in the matter, whether his interest in certain freehold land known as *Chobham Manor* estate was real or personal estate. The testator died in 1872, having by his will (subject to an annuity he bequeathed to his wife) devised and bequeathed his residue to his three children, the Plaintiff *George Andrew Wilson*, the Defendant *Esther Emily Holloway* (then *Esther Emily Wilson*), and *Henry Wilson* equally.

An agreement dated the 11th of January, 1867, was entered

into between *William Settles* and the testator in the following terms:—

"*William Settles* having purchased an estate called *Chobham Manor* estate, *Stratford, Essex*, conveyed to him by indenture dated the 16th day of February, 1866, for the sum of £18,000 purchase-money, a deposit of £1800 on account of which having been paid on the 5th day of September, 1865, and having paid interest and costs less rents due amounting to £422 16*s.*, which purchase was completed on the said 16th day of February, 1866, agrees to sell to *Andrew Wilson*, who agrees to purchase for the sum of £9231 12*s.*, one undivided moiety of the said estate as on the 16th day of February last, such purchase-money to be paid within three months from the date hereof with 5 per cent. per annum interest thereon or on so much as shall have been or shall from time to time be unpaid from the 16th day of February last until payment thereof, *Andrew Wilson* to bear one moiety of all monies which *William Settles* may have to pay to any person or persons on account of the purchase of the estate, and also one moiety of all the expenses connected with the estate since the 16th day of February last, including the ejectment of Mr. *Machin*, and to be entitled to one moiety of the profits thereof from that day upon payment by *Andrew Wilson* of the balance of the purchase-money and interest. *William Settles* will at the own expenses of himself and of *Andrew Wilson* convey to *Andrew Wilson*, his heirs and assigns, one moiety of the said estate, and until such conveyance, will after full payment of all the purchase-money and interest, stand seised of such moiety upon trust for *Andrew Wilson* and his heirs. *William Settles* acknowledges to have received of *Andrew Wilson* the following payments on account of such purchase-money at the dates here mentioned, viz., £1500 on the 4th day of April last, £500 on the 10th day of May last, £1200 on the 8th day of June last, and £662 2*s.* 8*d.* on the 13th day of July last.

"And it is expressly agreed that if *Andrew Wilson* shall make default in payment of the balance of the purchase-money and interest within the time before mentioned, *William Settles* shall be at liberty if he shall think fit to return to *Andrew Wilson* all monies paid by him on account of such purchase-money (without

NORTH, J.
1893
In re WILSON.
WILSON v. HOLLOWAY.

any interest) and by notice in writing to declare this agreement void, and the same shall be void accordingly, and *William Settles* shall thenceforth hold the estate for his own use solely, and *Andrew Wilson* shall have no claim to anything for interest, services, or otherwise, or *William Settles* may enforce such agreement. *Andrew Wilson* shall give all his services as a surveyor in the management and disposal of the estate, and use his best exertions to make the most profit for the same without any remuneration (but the work done by his clerks in his office may be charged). *William Settles* shall not be required to give any attention to the management or disposal of the estate further than he shall think fit. *Andrew Wilson* shall not (except by his will) dispose of his undivided moiety of the estate or any part thereof without the written consent of *William Settles.* And no agreement shall be entered into for the disposal of the entirety or any part of the estate either in fee or for any less interest without the concurrence of both parties."

The whole of the purchase-money payable by the testator under the agreement was not paid at the time of his death. The balance was paid by his executors. The testator's interest in the *Chobham Manor* estate was resold to *William Settles,* under the *Leases and Sales of Settled Estates Act,* 1856. The testator's son *Henry* died a bachelor and intestate in 1873. The testator's widow had recently died, and the question was consequently raised on the summons whether the interest of *Henry Wilson,* in the investments representing the testator's share of the *Chobham Manor* estate, devolved to the Plaintiff as heir, or belonged to the Plaintiff and Defendant as next of kin.

Cozens-Hardy, Q.C., and *J. M. Stone,* for the Plaintiff:—

The estate was held for the purpose of a partnership between the testator and *Settles* in the business of a land speculation. The interests of the two partners were therefore in the nature of personal estate: *Darby* v. *Darby* (1); *Re Hulton* (2).

S. Hall, Q.C., and *Ingle Joyce,* for the Defendant:—

In the cases cited it was intended to divide the proceeds of

(1) 3 Drew. 495. (2) 62 L. T. (N.S.) 200.

the land in question; there was no intention to divide the land in specie. Here the rights of the parties under the agreement between them are to have the land. There is no equity in one party to have any part of the land sold. There has, therefore, been no conversion.

Cozens-Hardy, in reply.

NORTH, J.:—

It was argued before me that the relationship of partners existed between the testator and *William Settles*, and that, therefore, testator's interest in the land belonging to the partnership was personal estate. I do not think the question, whether there was a partnership or not, is the point. The real question is, whether there was any trust or contract by virtue of which this land was subject to a direction or contract for conversion. The question whether there was a partnership or not does not seem to me directly material. No doubt, if a partnership was shewn to exist, we should get a good way; because, if land is partnership property, it is personal estate in the absence of anything to shew that the partners are entitled to retain it as land. But it may be converted, if there is no partnership between those interested in the land; and it may be unconverted, though there be a partnership. Supposing land were held for partnership purposes, and there were a definite agreement that at the end of the partnership term it should be conveyed as land. In that case, I take it, the interest of a partner would be real estate. On the other hand, supposing there was an agreement not amounting to a partnership, that land belonging to two is to be converted. In that case, I take it, the agreement would operate to make the interest of one of the parties personal estate, as between persons claiming through him. To see whether there was a conversion, it is necessary to look at the agreement.

[His Lordship observing on the use of the word profits as applicable to a partnership, and on other words as applicable to separate ownership, said:—] But the words I am coming to are all-important as shewing that there was no intention that the

NORTH, J.
1893
In re
WILSON
WILSON
v
HOLLOWAY

land should be sold. If the property is subject to any contract for sale or conversion, that contract must apply not only to the testator's moiety, but to the share of *William Settles* also. Now, the agreement provides: "*Andrew Wilson* shall not (except by his will) dispose of his undivided moiety of the estate or any part thereof, without the written consent of *William Settles*. And no agreement shall be entered into for the disposal of the entirety of any part of the estate, either in fee or for any less interest, without the concurrence of both parties." That provides that *Wilson* may dispose of his moiety by will; it cannot mean that he may dispose of merely his beneficial interest, because nothing could prevent his doing so. The provision is, that he is not to dispose of it except by will. Then as to *Settles*' share, there is no restriction whatever. No part of the property is to be disposed of without the concurrence of both parties—that is to say, there is no absolute contract or trust for the sale of the entire property or of any share therein: and the testator's moiety is not converted.

Solicitors for Plaintiff: *Stones, Morris, & Stone.*
Solicitors for Defendant: *Currie, Williams, & Williams.*

D. P.

In re MARQUIS OF AILESBURY AND LORD IVEAGH.

STIRLING, J.

1893

Jan. 12, 17, 31; *Feb* 4, 25; *March* 4.

[1893 A. 212.]

Settled Land—Series of Deeds creating a "Settlement"—Sale by Tenant for Life—"Charges having priority to the Settlement"—Jointure Rent-charges created by prior Instruments—Restraint on Anticipation—Right of Tenant for Life to convey discharged from Jointures—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 3, 20, 21, 22, 31, 44.

By indentures of settlement dated respectively in 1796, 1826, 1863, and 1885, the *A.* family estates became limited in 1885 to the use of *E.*, Marquis of *A.*, for life, with remainder to uses, *inter alia*, to secure the payment of certain jointure rent-charges, and then to the use of the present Marquis of *A.* for life, with remainders over. The first jointure was created under powers contained in the indentures of 1796 and 1826; the last jointure by the indenture of 1863; while the existing life estate was created by the indenture of 1885. Upon a sale by the tenant for life under the powers of the *Settled Land Act*:—

Held, that the whole series of deeds constituted a "settlement" within the meaning of sect. 20 of the *Settled Land Act*, 1882, and that consequently by virtue of that section the tenant for life had power to convey the estates freed and discharged from the jointure rent-charges; that the purchaser was not entitled to require the concurrence in the conveyance either of the jointresses or the trustees of the terms by which the jointures were secured; and that upon payment of the purchase-money to trustees for the purposes of the *Settled Land Act* of the settlement created by the series of instruments, the income of the investments of such purchase-money would be applicable first in payment of the jointure rent-charges, as the income of the estates, if not sold, would have been applicable.

One of the jointresses was by a settlement executed on her second marriage, restrained from anticipating her jointure. The Court made an order releasing such restraint, for the purpose of enabling her to consent to the payment, out of the purchase-money, of certain mortgages upon the estate over which her jointure had priority.

ADJOURNED SUMMONS.

This was a summons under the *Vendor and Purchaser Act*, 1874, taken out by the Marquis of *Ailesbury*, asking for a declaration that he, as tenant for life of certain estates in the counties of *Berks* and *Wilts* known as the *Savernake* estate, had power under the *Settled Land Act*, 1882, s. 20, to convey that estate, which he had contracted to sell to Lord *Iveagh*, discharged

STIRLING, J.
1893
In re MARQUIS OF AILESBURY AND LORD IVEAGH.

from three jointure rent-charges—viz., one of £1000 a year, charged in favour of *Maria*, Marchioness of *Ailesbury*, by an indenture dated the 19th of August, 1833; another of £500 a year, charged in favour of the same jointress by an indenture dated the 21st of January, 1836; and the third of £3000 a year, charged in favour of Lady *Evelyn Mary Riddell*, by an indenture dated the 3rd of January, 1863.

The state of the title to the *Savernake* estate was shortly as follows: By indentures of settlement, dated respectively the 11th of February, 1796, and the 13th of July, 1826, the estate was limited to such uses as *Charles*, Marquis of *Ailesbury*, and *George*, afterwards Marquis of *Ailesbury*, should jointly appoint, with remainder in default of appointment to the use of *Charles*, Marquis of *Ailesbury*, for life, with powers of jointuring a future wife with remainders over. The rent-charges in favour of *Maria*, Marchioness of *Ailesbury*, were created in exercise of those powers. By an indenture of settlement dated the 10th of May, 1837, the estate was, in exercise of the joint power of appointment, reserved by the indenture of the 13th of July, 1826, and, subject to the jointure rent-charges, limited to the use of *Charles*, Marquis of *Ailesbury*, for life, with remainder to *George*, Marquis of *Ailesbury*, for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of *Ernest*, afterwards Marquis of *Ailesbury*, for his life, with remainder to his first and other sons in tail male. *George John Brudenell Bruce*, the father of the Applicant, was the eldest son of *Ernest*, Marquis of *Ailesbury*, and the estate tail so limited to him was duly barred, and was resettled by an indenture of the 3rd of January, 1863. That indenture was the settlement made upon the marriage of *George John Brudenell Bruce*, with Lady *Evelyn Mary Craven* (now Lady *Evelyn Mary Riddell*), and by it the *Savernake* estate was, subject to certain charges, and amongst other uses, which need not be mentioned, limited to the use of *Ernest*, Marquis of *Ailesbury*, for life, with remainder to the use of *G. J. B. Bruce* for life, with remainder to uses for securing a jointure rent-charge of £3000 a year to Lady *Evelyn* for her life, with remainder to the first son of *G. J. B. Bruce* in tail male. *G. J. B. Bruce* died in 1868, leaving the Applicant, his only son.

In 1884 the Applicant converted his estate tail under the settlement of 1863 into a base fee, which, by a disentailing deed dated the 25th of June, 1885, was enlarged into a fee simple estate. By an indenture dated the 16th of July, 1885, the estate was limited, amongst other uses, to the use of the Marquis *Ernest* for life in restoration of his former life estate under the settlement of 1863, with remainder to the use of the Applicant for life, and with divers remainders over. *Ernest*, Marquis of *Ailesbury*, died in 1886. In June, 1891, the Applicant, as tenant for life, in exercise of the powers conferred upon him by the *Settled Land Acts*, 1882 to 1890, contracted with Lord *Iveagh* for the sale to him of the *Savernake* estate. The contract, by clause 3, provided as follows: "The vendor shall . . . apply to the Court under the provisions in that behalf of the *Conveyancing Act*, 1881, for the discharge of all encumbrances having priority to the settlement of the *Ailesbury* estates, under which the vendor is tenant for life, and the persons entitled to which shall not consent in writing to concur in the conveyance to the purchaser, and shall bear the expense of and incidental to and consequent on every such application."

By indentures of settlement dated the 3rd of December, 1869, and the 29th of August, 1877, being settlements respectively executed on the marriage of Lady *Evelyn Riddell*, her jointure of £3000 per annum was assigned to trustees and declared to be held upon trust to pay the same to her for her separate use without power of anticipation.

On the 8th of November, 1892, a summons was taken out by Lady *Evelyn Riddell* asking that, notwithstanding that she was by the indentures of the 3rd of December, 1869, and the 29th of August, 1877, restrained from anticipating her interest in the jointure rent-charge of £3000 per annum, she and the trustees of the said indentures respectively might be at liberty to release from such jointure rent-charge the estates upon which it was charged, and to surrender a certain term of 150 years in the same estates for securing such jointure rent-charge, to the intent that the said estates might be sold, and that her interest might be bound accordingly; and further, that the proceeds of sale might be applied in payment of all claims, expenses, and costs properly

STIRLING, J.
1893
In re MARQUIS OF AILESBURY AND LORD IVEAGH.

payable thereout, including a certain mortgage debt of £55,000 to which the said jointure rent-charge of £3000 per annum had priority, and that out of the balance of the proceeds of sale, or the investments representing the same, the trustees for the time being of the indenture of the 16th of July, 1885, might pay the jointure rent-charge of £3000 per annum to Lady *Evelyn Riddell.* This summons was adjourned into Court, and came on for hearing on the 31st of January, 1893, when his Lordship directed it to stand over in order that Lord *Iveagh,* who was not a party to it, might have the opportunity of being heard. The present summons was then taken out by the Marquis and now came on for hearing.

Buckley, Q.C., and *T. Cyprian Williams,* for the Marquis of *Ailesbury*:—

By sect. 20 of the *Settled Land Act,* 1882, the tenant for life is empowered, upon a sale by him under the powers of the Act, to convey the land sold discharged from all the limitations of "the settlement," and from all estates, interests, and charges subsisting or to arise thereunder. "The settlement" is defined in effect by sect. 2, sub-sect. 1, as "any . . . . instrument, or any number of instruments, whether made . . . . before or after . . . . this Act, under or by virtue of which . . . . any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession." The present case falls exactly within this definition. The estates stand limited under the deeds of the *Ailesbury* family settlement of 1796, 1826, 1863, and 1885, to the use that *Maria,* Lady *Ailesbury,* shall have jointures amounting to £1500; then to the use that Lady *Evelyn Riddell* shall have a jointure of £3000; then to the use of Lord *Ailesbury* for life; all these persons taking by way of succession. The deeds of 1796, 1826, 1863, and 1885, therefore, form "the settlement" discharged from the limitations of which Lord *Ailesbury* is empowered to convey the land; and he alone may well convey the estates freed from the jointures, and the powers of distress and entry, and the terms limited to secure their payment, which are now the only estates, interests, or charges subsisting under the deeds of 1796, 1826, and 1863, as well as from

his own life estate and the subsequent remainders subsisting under the deed of 1885. The jointures will then be charged on the investments and income of the purchase-money by sect. 22, sub-sect. 5, so that the jointresses will be perfectly well secured. It is submitted that there is no reason why the Court should place a narrower construction on the definition in sect. 2, sub-sect. 1, than is suggested by the plain meaning of the words used. On the contrary, the interpretation of the *Settled Land Act* by the House of Lords in *Bruce* v. *Marquess of Ailesbury* (1) shews that the policy of the Act is a wide one; as it was there laid down that its object is "the well-being of settled land." At all events, on the execution of the deed of 1885, whereby the Marquis *Ernest* took a life estate in restoration of his former life estate, the deeds of 1863 and 1885 at least formed "the settlement" for the purposes of the Act; and it will hardly be disputed that, if he had sold under the Act after 1885, he could have conveyed the land discharged from Lady *E. Riddell's* jointure. But if the deeds of 1863 and 1885 (at least) formed "the settlement" while the Marquis *Ernest* was alive, are they any the less "the settlement" merely because he is dead? Under sect. 2, sub-sect. 4, the question whether land is settled land for the purposes of the Act is to be determined according to the state of facts and the limitations of "the settlement" at the time of "the settlement" taking effect. That time in the present case was the date of the execution of the deed of 1885, when, by the joint operation of the deeds of 1796, 1826, 1863, and 1885, the land for the first time stood limited to all the now subsisting uses.

That the jointresses and the tenant for life take by way of succession is shewn by the fact that the tenant for life, on becoming entitled in possession, was only chargeable with succession duty on the value of the profits of the estates *minus* the amount of the jointures. And as each jointure is extinguished he will be chargeable with succession duty on the increase in value thereby accruing to his life estate as upon a new succession. Moreover, the whole land stands limited to the use that each jointure shall arise; each jointure issues out of every part of the land; and in the event of a diminution of the profits, the first

(1) [1892] A. C. 356.

STIRLING, J.
1893
In re MARQUIS OF AILESBURY AND LORD IVEAGH.

jointress must be paid in full before the second can take anything, and both must be satisfied before the tenant for life can touch one penny. The scheme of the *Settled Land Act* is to give the management of the family property to the tenant of the first estate of freehold, and to enable him to convey all estates and interests, whether prior or posterior to his own, which have been created merely to give the donees thereof the beneficial enjoyment of the whole or any part of the profits of the lands. Sect. 20 contains the only power of conveyance given by the Act, and applies to leases as well as sales. That a lessee should have a sure estate must tend to the well-being of settled land. The more convenient construction is, therefore, that the tenant for life shall have power to grant a lease which shall take precedence of the interests of all jointresses. Otherwise, if a jointure fell into arrear, the jointress might distrain upon the goods of the lessee, and oust him under her powers of entry. The Act does not say that "the settlement" shall be the instrument creating the tenant for life's estate.

Hastings, Q.C., and *Tremlett*, for Lady *Evelyn Riddell*.

Sir *Reginald Cust*, for the trustees of the settlement of 1885:—

The Marquis is selling the estate as tenant for life under the settlement of 1885 alone. On the death of the Marquis *Ernest*, the operation of the deed of 1863 was exhausted. The suggested construction of the Act is much too wide. It involves the necessity of going back for one hundred years to find out what is "the settlement."

[STIRLING, J.:—Does anybody suffer any injury provided that proper trustees of the old instruments are appointed so as to protect the interests of all parties thereunder?]

The question is open to doubt, having regard to sect. 20.

[STIRLING, J., referred to *Hood* and *Challis* on Conveyancing (1).]

Spencer Butler, for Lord *Iveagh*:—

The definition of "settlement" which is contended for is novel

(1) 3rd Ed. p. 220.

and surprising, and entirely upsets all the ideas which have governed dealings with settled land in the past. It is said that the tenant for life can sell the estate discharged from the interests of all the jointresses, notwithstanding that their jointures are created by instruments anterior to that under which the tenant for life takes. Hitherto jointures have always been regarded as incumbrances. The definition of "settlement" in the Act of 1882 is not new. It is in effect the same as that in the *Settled Estates Act*, 1877, which was a consolidating Act, and the definition there given came down from the *Leases and Sales of Settled Estates Act*, 1856. Although it has constituted the law for forty years, it has never been supposed that a tenant for life could sell the estate over the heads of his predecessors in title. In order to support the view which is contended for, it is necessary to go back to the settlement of 1796, and to shew that the Marquis is tenant for life under that and every one of the subsequent settlements within the *Settled Land Act*.

The jointure must be either an interest in land or an incumbrance. In the former case it is submitted that the jointress must be regarded as having an interest concurrent with that of the tenant for life, and under sect. 2, sub-sect. 6, her concurrence in the conveyance is necessary; in the latter case, she is clearly an incumbrancer with a charge upon the land in priority to the interest of the tenant for life, and her concurrence is equally necessary.

[STIRLING, J.:—Under sect. 2, sub-sect. 4, the determination of the question whether land is settled land for the purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of its taking effect.]

Those are very vague words, and have given rise to much difficulty. If the Act is to be construed as suggested, it is difficult to conceive how there could ever be any "estate interest or charge having priority to the settlement."

In cases under the *Succession Duty Act*, 1853, ss. 2, 4, it has been held that a disposition of property takes effect once and once only: *In re Lovelace* (1); *In re Barker* (2).

(1) 5 Jur. (N.S.) 428, 694. (2) 7 Jur. (N.S.) 1061.

STIRLING, J.
1893
In re MARQUIS OF AILESBURY AND LORD IVEAGH.

When can it be said that this compound settlement takes effect?

The definition of "incumbrance" given in sect. 2, sub-sect. vii., of the *Conveyancing and Law of Property Act*, 1881, clearly includes a jointure rent-charge; and under sect. 5 of that Act there is a provision for the discharge of incumbrances on the sale of land upon payment into Court of a sum of money sufficient to meet such incumbrances. The purchaser could, no doubt, get a good title in that way, and that would be more in accordance with the contract. The contract provides for completion in six weeks' time, and gives the purchaser a right to rescind if there is delay in completion caused by any one but himself. If the contention that the settlement is really a compound instrument comprising all the earlier settlements be accepted, then trustees will have to be appointed of them for the purposes of the Act, and that will cause considerable delay. Lord *Iveagh* will have to consider whether he will not exercise his right of rescission. Sect. 20, sub-sect. 2, provides that a deed executed by a tenant for life to give effect to a sale under the Act shall operate subject to all estates, interests, and charges, having priority to the settlement. If the theory of the compound settlement be accepted, how can there be any estates or interests having priority to it?

By sect. 2, sub-sect. 5, a "tenant for life" is defined as the person who for the time being is entitled, under a settlement, to possession of settled land for his life. Lord *Ailesbury* cannot be said to be so entitled under the settlements creating the jointures, and he cannot, therefore, have any power to convey the estate freed from those jointures.

T. Cyprian Williams, in reply:—

It was laid down in the House of Lords that the object of the *Settled Land Act* was to give wider powers than were given by the *Settled Estates Acts*, or the old express powers of sale; and the present case ought not to be decided by considerations based upon the scope of the latter Acts and powers. Under the *Settled Estates Acts*, a sale could only be made by the authority of the Court, and *primâ facie* the consent of all parties interested was

required. Express powers of sale were conferred by act of parties, and were really powers of revoking the uses limited by a settlement; they were, therefore, necessarily measured by the estate limited by the settlement. The powers given by the *Settled Land Act* are conferred by an act of sovereignty, overriding the intentions of the parties who created the existing estates in the land. The interests of the jointresses are not concurrent with that of the tenant for life, who is defined (sect. 2, sub-sect. 5) as the person beneficially entitled to possession of the land. So long as their jointures are paid, the jointresses are trespassers if they enter on the land without the license of the tenant for life. But if they should become entitled to exercise their powers of entry, they would then have the right to oust him. Their interests are, therefore, mutually exclusive, and are not concurrent, but successive. It does not follow, because the jointures are charges on the life estate, that they are "charges having priority to the settlement." By sect. 2, sub-sect. 7, a tenant for life shall be deemed to be such, notwithstanding that, under "the settlement" or otherwise, the settled land or his estate therein is encumbered or charged in any manner. The words "estates, &c., having priority to the settlement" in sect. 20, sub-sect. 2, cl. i., would be satisfied by a mortgage in fee, the freehold in the case of a settlement of copyholds or leaseholds, or a charge of succession duty, or under the *Improvement of Land Act*, 1864.

March 4. STIRLING, J. (after stating the facts of the case, continued):—

Sect. 20 of the *Settled Land Act* of 1882 provides in sub-sect. 1 that "On a sale . . . . the tenant for life may, as regards land sold, ... convey . . . . the same by deed, for the estate or interest the subject of the settlement . . . . to the uses and in the manner requisite for giving effect to the sale;" and according to sub-sect. 2, "Such a deed . . . . is effectual to pass the land conveyed . . . . discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—(i.) all estates, interests, and charges

STIRLING, J.
1893
In re MARQUIS OF AILESBURY AND LORD IVEAGH

having priority to the settlement." Now, in order to ascertain what is the power of the tenant for life under that section, and the effect of the deed executed by him in pursuance of such power, it is necessary to determine what constitutes "the settlement" within the meaning of the section. This is to be ascertained from sect. 2, the definition clause, the material sub-sections of which are as follows:—Sub-sect. 1: "Any deed . . . . or other instrument, or any number of instruments, whether made . . . . before or after . . . . the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires." Sub-sect. 3: "Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land." Sub-sect. 4: "The determination of the question whether land is settled land, for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect." Sub-sects. 1 and 3 are in substance taken from the *Settled Estates Act* of 1856 (19 & 20 Vict. c. 120), s. 17, under which it was held by the Court of Appeal—*Re Birtle's Settled Estates* (1), decided in 1863—that in determining the question whether or not an estate was to be treated as settled for the purposes of that Act regard was to be paid to the state of facts existing at the time when the provisions of the Act were sought to be put in operation, and not to that which existed at the date of the settlement. This led to the passing in 1864 of an enactment substantially identical with sub-sect. 4. The enactments embodied in sub-sects. 1, 3, and 4 were repeated in the *Settled Estates Act* of 1877, s. 2. It appears, therefore, that the Legislature intended that the powers conferred by the *Settled Estates Acts* should be applicable in cases where the land was settled at the time of the settlement taking effect, even though most of the limitations might be spent at the time when the exercise of those powers was invoked. The *Settled Land Act*, 1882, contains analogous enactments, expressed in

(1) 11 W. R. 739.

almost identical language, and it seems right to attribute to the Legislature a like intention with respect to the powers under that Act, unless there is discovered something in the nature of the provisions of the Act to prevent such a conclusion from being arrived at. It has been established by the decision of the House of Lords in this very case (see *Bruce* v. *Marquess of Ailesbury* (1)), that the *Settled Land Act* of 1882 is founded on a broader policy and has a wider scope than the *Settled Estates Acts*. In the former Act it is said the well-being of settled land is the paramount object, in the latter the interests only of the persons interested under the settlement. There is nothing, therefore, in the scope of the *Settled Land Act* which would lead one to suppose that the powers conferred by that Act were to be applied within a narrower ambit than those conferred by the *Settled Estates Acts*. On the contrary, it tends to the well-being of settled land, and is for the benefit of those interested in it under the settlement, that the persons vested with the powers conferred by the Act should be able to give a title to the land, and not merely to some limited estate or interest in it. The machinery, however, of the *Settled Land Act* differs from that of the *Settled Estates Acts*, as does also the mode in which that machinery is put in operation. Under the *Settled Land Act* the powers are given directly to the tenant for life of the settled land, as defined by sect. 2, sub-sect. 5, and sect. 58. Under the *Settled Estates Act* of 1877 (as under the previous Acts) the powers are to be exercised by the Court upon the application (see sect. 23) of any person entitled to the possession or receipt of the rents and profits of the settled estate for a term of years determinable on his death, or for an estate for life or any greater estate. Regard being had to this difference of language, it may well be that a person entitled to apply to the Court under the *Settled Estates Acts* is not vested with the powers of a tenant for life under the *Settled Land Act*. The conclusion at which I arrive is that, though the question whether land is settled land or not is to be determined under both sets of Acts by the state of facts and the limitations of the settlement at the time when the settlement takes effect, the provisions of the *Settled Land Act*

(1) [1892] A. C. 356.

STIRLING, J
1893
In re MARQUIS OF AILESBURY AND LORD IVEAGH.

may cease to be applicable when the limitations have been exhausted to an extent which would not prevent recourse being had to the powers of the *Settled Estates Act.*

Now, on the 16th of July, 1885, there was executed an instrument, operating *inter vivos*, under which the *Savernake* estate became limited to various persons by way of succession, and on that day the instrument took effect. No instrument of later date has created limitations of the *Savernake* estate by way of succession, and I think that according to sect. 2, sub-sect. 4, of the Act the question whether the estate is settled land for the purposes of the Act must be determined as on that date. At that time the *Savernake* estate was unquestionably settled: it stood limited to various persons by way of succession; but the deed of the 16th of July, 1885, was not the only instrument under which at that date it stood so limited. There then existed, under and by virtue of the settlement of 1863, the life estate of *Ernest*, Marquis of *Ailesbury*, and the rent-charge of Lady *Evelyn Riddell.* I think that the deeds of the 3rd of January, 1863, and the 16th of July, 1885, are instruments under which (in the language of sect. 2, sub-sect. 1) the *Savernake* estate, at the date of the latter deed, stood limited to various persons by way of succession, and together created or were a settlement for the purposes of the *Settled Land Act.* This being so, the powers of the *Settled Land Act* will be exercisable as regards the estate which forms the subject of the settlement effected by those two instruments, provided there is under that settlement an existing tenant for life within the meaning of the Act. I think the present Marquis of *Ailesbury* is such. If, on the 16th of July, 1885, the *Savernake* estate had been vested in *Ernest*, Marquis of *Ailesbury*, in fee simple, and had by the deed of that date been for the first time limited to the use of *Ernest*, Marquis of *Ailesbury*, for life, with remainder to the use that Lady *Evelyn Riddell* should receive her jointure, with remainder to the present Marquis for life, with remainders over, it was admitted (and in my opinion rightly admitted) at the Bar that (subject to a question with which I shall presently deal) after the death of *Ernest*, Marquis of *Ailesbury*, the present Marquis would have been a tenant for life capable of exercising the powers of the

Settled Land Act, and, consequently, of conveying the estate under sect. 20 free from the jointure of Lady *Evelyn Riddell*; and in my opinion he is a tenant for life equally capable under the settlement constituted by the two instruments of 1863 and 1885. It was suggested, however, that the present Marquis of *Ailesbury* was not the sole tenant for life for the purposes of the Act, but that he and Lady *Evelyn Riddell* together constituted such tenant for life. Sub-sect. 5 of sect. 2 provides that the person who is for the time being under a settlement beneficially entitled to possession of settled land for his life is for the purposes of the Act the tenant for life of that land, and (sub-sect. 6) that if in any case there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purposes of the Act. The Marquis is beneficially entitled to possession or—see sub-sect. 10, cl. i.—receipt of the profits of the *Savernake* estate; but it is said that Lady *Evelyn* by virtue of her jointure is so entitled for a concurrent estate or interest. I think, however, that so long as her rent-charge remains paid (as I understand it to have been down to the present time) she has merely a charge on the settled land, and not an estate or interest concurrent with that of the Marquis. It follows, therefore, that the Marquis can convey under sect. 20 of the *Settled Land Act*, 1882, discharged from the jointure of Lady *Evelyn Riddell*. I now turn to consider whether the Marquis can in like manner convey the estate discharged from the jointures of *Maria*, Marchioness of *Ailesbury*. [His Lordship then stated the facts with regard to those jointures, and continued:—]

It appears, therefore, that the life estate to which *Ernest*, Marquis of *Ailesbury*, was entitled on the 16th of July, 1885, was first created by the deed of the 10th of May, 1837, which derives its force from the settlement of the 13th of July, 1826, being made in exercise of the joint power thereby reserved. The limitations in the deed of the 10th of May, 1837, take effect as if they were contained in the deed of the 13th of July, 1826. Upon the principles which I have already applied in dealing with Lady *Evelyn Riddell's* jointure, I think that, if what I have stated as to the title be correct, then upon the

STIRLING, J.
1893
In re MARQUIS OF AILESBURY AND LORD IVEAGH.

execution of the deed of the 16th of July, 1885, the *Savernake* estate stood limited to uses in favour of various persons by way of succession, under or by virtue of a series of instruments beginning with the deed of the 11th of February, 1796, and ending with that of the 16th of July, 1885; that the present Marquis of *Ailesbury* is now tenant for life of the settlement created by those instruments, and can, consequently, convey the estate discharged from the jointure rent-charges of *Maria*, Marchioness of *Ailesbury*, as well as from that of Lady *Evelyn Riddell*. Under sect. 22, sub-sect. 1, of the *Settled Land Act*, 1882, the purchase-money is to be paid either to the trustees of the settlement or into Court at the option of the tenant for life. The Marquis of *Ailesbury* does not desire that the money should be paid into Court, and there are at present no trustees for the purposes of the *Settled Land Acts* except those nominated by the deed of the 16th of July, 1885. They are trustees only of the settlement created by that deed, and are not trustees of the settlement made by the deeds of 1863 and 1885, still less of that made by the series of instruments beginning in 1796 and ending in 1885. I understand, however, that they do not object to be appointed such trustees; and, if so, I am willing to appoint them on the present application. By sect. 31, sub-sect. 3, the Court may, on the application of the tenant for life or of any person interested in any contract, give directions respecting (amongst other things) the carrying into effect thereof. By sect. 44, if at any time a difference arises between a tenant for life and the trustees of the settlement respecting the exercise of any of the powers of the Act or any matter relating thereto, the Court may, on the application of either party, give directions respecting the matter in difference. It may be thought desirable that under one or other of these clauses I should give directions with respect to the conveyance and the application of the purchase-money. I am, therefore, willing to declare that *Maria*, Marchioness of *Ailesbury*, and Lady *Evelyn Riddell*, are respectively bound by the contract entered into between the present Marquis and Lord *Iveagh*; that the latter is not entitled to require the concurrence of either in the conveyance to him; and that upon the payment of the purchase-money to the trustees of the

settlement created by the series of instruments to which I have referred, the income of the investments of such purchase-money will be applicable for payment of the rent-charges of *Maria*, Marchioness of *Ailesbury*, and Lady *Evelyn Riddell* respectively, as the income of the *Savernake* estate, if not sold, would have been applicable. And I am further willing to direct such trustees to pay these rent-charges out of such income accordingly. [His Lordship then made an order on Lady *Evelyn Riddell's* summons removing her restraint on anticipation for the purpose of enabling her to consent to the payment off out of the purchase-moneys of the mortgages to which her jointure had priority.]

By the Order, as drawn up, upon the summons in *In re Marquis of Ailesbury and Lord Iveagh*, it was directed that the summons should be amended by intituling it in the matter of the *Settled Land Acts*, as well as in the *Vendor and Purchaser Act*, 1874. It was then declared that the jointresses were respectively bound by the contract, and that, Lord *Ailesbury* having power to convey the estate free from the rent-charges and the terms by which they were secured, Lord *Iveagh* was not entitled to require the concurrence in the conveyance of the jointresses or of the trustees of the said terms; and that, upon payment out of the purchase-money of the mortgage of £55,000, and upon payment in part, and securing in part by mortgage, of the purchase-money to the trustees, for the purposes of the *Settled Land Act*, of the settlement created by the series of deeds, or into Court, the income would be applicable to and charged with the payment of the jointures, in the same manner as the income of the estates. It was further ordered that, upon completion of the sale, the trustees should pay the said rent-charges accordingly. The Order also provided for the appointment of trustees for the purposes of the Act, and it was further declared that neither of the jointresses was, either solely or concurrently with Lord *Ailesbury*, a tenant for life.

His Lordship added that he was willing at once to appoint the trustees of the deed of 1885 to be trustees, for the purposes of the *Settled Land Acts*, of the compound settlement, if they would consent to act as such trustees.

STIRLING, J.
1893
In re MARQUIS OF AILESBURY AND LORD IVEAGH.

Spencer Butler, objected that one of the trustees of the deed of 1885 (Mr. *Laurence*) could not be appointed a trustee of the compound settlement, inasmuch as he was the solicitor of the tenant for life: *In re Kemp's Settled Estates* (1).

His Lordship overruled the objection, being of opinion that the matter was within his discretion, and that in the present case the convenience of appointing the trustees of the deed of 1885 outweighed the objection that the Court might otherwise have had to the appointment of the solicitor of the tenant for life.

Solicitors: *G. B. Laurence & Co.; Eardley-Holt, Hulbert, & Hubbard; Nicholl, Manisty & Co.; Travers Smith & Co.; Peacock & Goddard.*

(1) 24 Ch. D. 485.

G. A. S.

HOPE *v.* D'HÉDOUVILLE.

KEKEWICH, J.

[1889 H. 1553.]

1893 Feb. 15.

Settlement—Real Estate—Sale—Conversion, Immediate Trust for—Power to postpone Conversion, Absence of—Tenant for Life—Enjoyment in Specie—Interim Rents—Investment.

Realty was settled upon trust to pay the rent to *A.* for life, and immediately after her death to sell and invest and to pay the dividends of the trust stock to *B.* for life, with limitations over of the *corpus* of the trust stock. *A.* died leaving *B.* surviving, who died about a year after *A.* The land was sold without undue delay after *A.*'s death, but not till after the death of *B.* The rents received between the death of *A.* and *B.* produced more than 4 per cent. on the amount realized on the sale:—

Held, that notwithstanding the absence of any power to postpone the sale, or any direction as to the interim rents, the whole rents between the deaths of *A.* and *B.* belonged to *B.*'s personal estate.

By an indenture of settlement dated the 31st of October, 1854, to which *Frances*, Comtesse *d'Hédouville*, and her husband, *Theodore Ernest*, Comte *d'Hédouville*, were parties, the Comtesse assigned to trustees her moiety of one-third of certain leasehold lands and hereditaments, held under lease from the Ecclesiastical Commissioners periodically renewable (the other moiety of such one-third being the property of Miss *Ellen Sansom*, the sister of the Comtesse), upon trust, during her life, to pay the annual profits to her for her separate use, without power of anticipation; and from and immediately after her decease upon trust to sell and convert into money the whole of the said moiety of one-third, and out of the clear moneys to arise from such sale to pay the sum of £4000 to her husband, the Comte *d'Hédouville*, and invest the surplus in the stocks or funds therein mentioned, and to pay to the Comte, if he should survive her, "the annual dividends and profits of the trust stock" during his life; and from and after the death of the survivor "the trust stock aforesaid" was to be held upon trust for such persons as the Comtesse should by deed or will appoint; and, in default of and subject to appointment, upon trust for her next of kin. The deed contained no express power for the trustees to postpone the sale and conversion, nor

KEKEWICH, J.
1893
HOPE v. D'HÉDOUVILLE.

any direction as to the application of rents and profits in case of no immediate sale taking place after the death of the Comtesse.

In the year 1870, by arrangement between the Ecclesiastical Commissioners, the trustees of the settlement of 1854, and the persons beneficially interested in the other shares of the leasehold premises, the reversion of part of the premises comprised in the lease was conveyed by the Ecclesiastical Commissioners, by a deed executed in 1870, in exchange for the surrender of the rest of the premises, one undivided moiety of such reversion being conveyed to the trustees of the deed of 1854 upon the trusts thereof, and the other undivided moiety being conveyed to *Ellen Sansom* in fee. By a deed-poll dated the 3rd of August, 1880, the Comtesse, purporting to exercise her said power of appointment, appointed that, after the decease of the survivor of the Comte and herself, "so much of the said freehold hereditaments"—meaning those subject to the trusts of the settlement of 1854—"or of the proceeds of sale thereof," as should remain after raising a sum of £4000 for the Comte, should be upon trust to pay the sum of £1000 each to *Louis d'Hédouville* and *François d'Hédouville*, the nephews of the Comte, in case they or either of them should be living at the decease of the survivor of the Comte and Comtesse, and as to three-sevenths of the residue "of the said freehold hereditaments and the proceeds of sale thereof," upon trust to pay the income unto and equally between her nieces, *Ellen Harris* and *Laura Magniac*, for their joint lives, and after the death of either leaving issue her surviving, upon trust as to one-half of the said three-sevenths for her said niece absolutely as personal estate; but in case either of her said nieces should die without leaving issue her surviving, then the share of the niece so dying should go over and be held in trust for the other of her said nieces in like manner as her original share; but in case both the said nieces should die without leaving issue as aforesaid, then the said three-sevenths should be held upon the like trusts as were thereinafter declared respecting the two-sevenths appointed to *Henriette Puliga*, widow, and her children; and as to two-sevenths of the residue of the said freehold hereditaments or sale money, upon trust for the Comtesse's sister, *Ellen Sansom*, absolutely; and as to the remaining two-sevenths

of the residue "of the said freehold hereditaments or proceeds of sale thereof," upon trust to pay the income to the said *Henriette Puliga* for her life for her separate use without power of anticipation; and after her death, upon trust to pay and divide the same to and between such of her then present children living at her decease, and such child or children living at her decease of any such child or children of her who might die in her lifetime as being a male should attain twenty-one, or being a female should attain that age or marry, in equal shares; but the children of any deceased child to take their parent's share.

The Comtesse *d'Hédouville* died on the 5th of March, 1889, leaving her husband, the Comte, surviving her.

Laura Magniac, a niece of the Comtesse named in the deed of appointment, died in the lifetime of the Comtesse without issue. *Ellen Harris*, the other niece named in the appointment, was still living, but had at present had no issue. *Henriette Puliga* was also living, and had two children.

In 1889 this action was commenced by the trustees of the deeds of 1854 and 1870 against the Comte *d'Hédouville*, his said two nephews, and *Ellen Harris*, *Ellen Sansom*, *Henriette Puliga*, and her two children, both of whom were then infants, to have the rights of the respective beneficiaries entitled under the trusts of the deeds of 1854 and 1870, or the appointments thereunder, ascertained and declared; partition; and, so far as might be necessary, administration of the trusts of those two deeds. Since the commencement of the action one of *Henriette Puliga's* two children—a son—had attained twenty-one, and he and his mother had mortgaged their interests under the two deeds.

On the 28th of February, 1890, during the progress of the action, the Defendant, the Comte, died intestate. His nephew, the Defendant *Louis d'Hédouville*, was his legal personal representative. On the 11th of August, 1891, an order was made directing certain accounts and inquiries. On the 11th of May, 1892, the share comprised in the settlement of 1854 was sold by the trustees for £19,965. It was admitted that, although by the terms of the settlement the trust for sale was required to be exercised immediately after the death of the Comtesse, there had been no undue delay in the sale, and that the trustees sold

KEKEWICH, J.
1893
HOPE v. D'HÉDOUVILLE.

as soon as circumstances permitted. In the interval between the death of the Comtesse and the death of the Comte the trustees had received net rents and profits from the unsold settled property amounting to £1254 11*s.* 3*d.*

Upon the action now coming on upon further consideration, the question arose whether the Defendant *Louis d'Hédouville*, as the legal personal representative of the deceased Comte, was entitled, under the terms of the settlement of 1854, to claim the whole of the £1254 11*s.* 3*d.* as part of the estate of the Comte, or whether he was entitled only to a sum representing interest for that period at 4 per cent. on the £19,965, the proceeds of sale.

Hopkinson, Q.C., and *Dauney*, for the Plaintiffs.

Warmington, Q.C., and *Warrington*, for the Defendants, *Louis d'Hédouville* and *François d'Hédouville*:—

We say that the whole of the net rents accrued between the deaths of the Comtesse and the Comte belonged to his legal personal representative as part of his estate. It is contended on the part of the remaindermen that the Comte's estate ought to have the income of a notional investment as from the death of the Comtesse, on which event the settlement of 1854 directed an immediate sale, and is not entitled to the rents and profits *in specie*; but we submit that is not correct. The true construction and effect of the settlement, so far as the interest of the Comte was concerned, were to give him the interim income of the property prior to conversion, the conversion having been, as in fact admitted, made at the right time. In the case of personal estate, the rule is that where at the death of the testator the property is not in the state in which it is directed to be, the tenant for life is, before the conversion, entitled, not to the annual produce, but to a reasonable fruit of the property, from the death of the testator up to the time of the conversion: *Dimes* v. *Scott* (1). But there appears to be no authority as to whether the rule applies to real estate which has yielded a rental beyond what would have been the annual produce of the purchase-money, and

(1) 4 Russ. 195.

there has been no depreciation. In such a case the question, as put in *Lewin* on Trusts (1), is, Can the remainderman call back the extra rent received by the tenant for life, or, as the remainderman gets all that was ever intended for him, viz., the undepreciated property, may the tenant for life keep the full rent? Applying that to the present case, why should these rents go to swell the *corpus* for the benefit of the remaindermen? All they are entitled to is the *corpus* of the undepreciated property: and here there is no depreciation. Why should they take the profit any more than the tenant for life? There is no principle that the remainderman should be benefited at the expense of the tenant for life. We submit that the tenant for life is entitled to what is produced by the trust property during the continuance of his interest, and that there is no Equity for increasing the capital by taking away from him the income of property which is not wasting and has not wasted.

[KEKEWICH, J., referred to *In re Thomas* (2).]

That case was decided on *Brown* v. *Gellatly* (3), and that class of cases, having really no application to the present. [*In re Hengler* (4) was also cited.]

Marten, Q.C., and *Yardley*, for the Defendant *Ellen Harris*:—

We contend that since, under the settlement, the trust for sale arose immediately upon the death of the Comtesse, the trust must be treated as executed immediately, and that the utmost the Comte's representative can get for the period during which the Comte survived the Comtesse is the income arising from Consols, supposing the property had been sold on the death of the Comtesse and the proceeds of sale invested. The deed of appointment sweeps up what does not go to the tenant for life, including these rents and profits which are not given to the tenant for life; they therefore go to the remaindermen as capital *in specie*. If the Comte's representative takes these rents and profits he must give credit for the interest on the £4000 during the period in question.

(1) 9th Ed. pp. 323–4.
(2) [1891] 3 Ch. 482.
(3) Law Rep. 2 Ch. 751.
(4) W. N. (1892) 193; [1893] 1 Ch. 586.

KEKEWICH, J.
1893
HOPE v. D'HÉDOUVILLE.

MacSwinney, for the Defendant *Ellen Sansom*, took the same view, contending that the Comte's representative should be allowed out of the accrued rents a sum equivalent to the dividends on Consols, as if there had been an immediate conversion and investment on the death of the Comtesse. In *Dimes* v. *Scott* (1) and *In re Thomas* (2), there was a discretionary power in the trustees to postpone conversion.

Ashton Cross, for the Defendant, the infant child of *Henriette Puliga*, took the same view.

R. F. Norton, for the mortgagees of the interest of *Henriette Puliga* and her adult child.

Warmington, in reply:—

There is no case in which persons entitled only to *corpus* have been allowed any part of the income except as compensation for loss of income of property remaining *in specie* and thereby suffering depreciation. Here there is no depreciation.

KEKEWICH, J.:—

It is refreshing to find a point which all the counsel engaged in this case are agreed in saying is a novelty; and my own recollection entirely confirms the result of their industry.

The point I have now to decide is closely connected with that decided in *In re Thomas*, though it is essentially a different one. In that case I had to consider what ought to be done with the income of property consisting of American bonds directed to be converted, but the conversion of which was postponed under an authority for that express purpose contained in the will; and I had to consider how far the tenant for life of the proceeds of conversion might claim to enjoy unconverted property *in specie*, without any express direction that he was so to enjoy it. In harmony with what I believed, and still believe, to be the rule of convenience, I held that the Court was at liberty to find an intention on the part of the testator or settlor that the property might be enjoyed *in specie*. Here I have the one thing wanting

(1) 4 Russ. 195. (2) [1891] 3 Ch. 482.

which was not wanting in *In re Thomas* (1). Here I have an immediate trust for conversion and no power of postponement at all, and no evidence that either party to the deed contemplated postponement; and the short question is, not whether the tenant for life can enjoy the property *in specie*, but whether the tenant for life is entitled to receive the rents accrued between the time when the trust for conversion takes effect and the time when the conversion is actually effected. It is conceded on all hands that there was no undue delay here in making the conversion—that it took place as soon as circumstances permitted. What ought to take place where there is delay in conversion—that is to say, where the trustees are to blame—is outside my decision altogether. I am assuming that the trustees who had to convert immediately on the death of the Comtesse, the tenant for life, did convert, though not on the day of the death, yet as soon after as all the circumstances permitted. Putting aside for the present purpose the £4000, the Comte is to have the income of the "trust stock," that is to say, of the authorized securities upon which the proceeds of sale are to be invested. He is not given expressly any of the rents and profits during the interval to which I have referred. But it is important to observe that they are not given to any one else, and that there is no precise indication that any one at all should take them. Then, after his death, "the trust stock aforesaid" is to be held upon trust for such persons as the Comtesse shall by deed or will appoint. Her power, therefore, is over the trust stock; but she has purported to do something more, namely, to appoint the hereditaments themselves or the proceeds of sale. She had no power to appoint the hereditaments under her power to appoint further than that she had power to appoint the proceeds of sale; and she had no power to appoint the income of unconverted hereditaments unless they were assimilated to and brought within the description of proceeds of sale. Her power is entirely confined to that, and cannot possibly pass income received from conversion if it does not belong to the preceding tenant for life or some one else. It comes to this, that if I cannot extract from the document a gift of these rents and profits to some one, no one takes them at all, and they are

(1) [1891] 3 Ch. 482.

KEKEWICH, J.
1893
HOPE v. D'HÉDOUVILLE.

undisposed of, and would go in this case to the settlor by resulting trust. That is such an absurd conclusion that one hesitates to adopt it, and one necessarily struggles to find some other conclusion, and I think one can do that without doing violence to the words.

What is the object of conversion? It is to turn what is land into invested money. Thus the object and intention are that the tenant for life shall have the income of invested money; but subject to the paramount trust for conversion and as long as this is not defeated, there is nothing inconsistent with the settlement in holding that the tenant for life is to receive the rents. He is to have the annual dividends and profits of the trust stock—that is, the trust stock which can only be reached by conversion: and it appears to me that one is driven to the conclusion that the intention of the settlor must be implied, though it is not expressed, that until the stock makes dividends the equivalent in rents and profits is applicable in like manner.

The alternative is to say that there is to be at the death of the Comtesse a notional conversion, and that when the conversion is ultimately made and the precise amount ascertained, you must treat it as having been invested—and I suppose you must treat it as having been invested in Consols, notwithstanding that it is actually invested in something else, or that it is invested in something producing 4 per cent.—and then pay to the tenant for life only the income which would have been derived from the sum of money available for investment. In either case you are taking something out of the capital to give to the tenant for life, and with this result—that you do not solve the difficulty. The rents and profits are still received, and what happens then? In that event it is said they must go and be added to the capital. That would be doing great violence to the words of the instrument, because it says that the ultimate owners are to have the stock, while the income is to go to the tenant for life. The difficulty here is that there is not a word to shew that the tenant for life is to have the rents and profits before conversion. It is said that to hold that the tenant for life ought to have these rents and profits might work to the disadvantage of the remainderman, and that such a construction would be opposed to the words of the instru-

ment. In my opinion, it is far better to see, in the direction to pay the annual dividends of the trust stock, a direction that the tenant for life shall have the income of the property whatever it may consist of, assuming that the conversion is properly conducted at a proper time under all the circumstances of the case.

I hold, therefore, that the tenant for life became entitled to these rents and profits.

Solicitors: *Shoubridge & May; Caprons, Dalton, Hitchins, & Brabant; Harwood & Stephenson; Denton, Hall, & Burgin; Lawrence, Graham, & Co.*

G. I. F. C.

In re WYTHES. WEST *v.* WYTHES.

KEKEWICH, J.
1892 *Oct.* 25; 1893 *March* 4.

[1883 W. 1213.]
[1883 W. 1999.]

Settled Land Acts, 1882 *to* 1890—*Equitable Tenant for Life—Possession—Title Deeds.*

The powers granted to, and the duties imposed on, an equitable tenant for life of land by the *Settled Land Acts* have raised a presumption in favour of his title to possession which did not before exist, and have made it incumbent on the Court to provide that, if the estate and the trustees can be adequately protected by reasonable safeguards, an equitable tenant for life shall be let into possession, and be enabled personally to exercise those powers, and discharge those duties, unless there be found some urgent reason to the contrary.

An equitable tenant for life of land, whose estate was determinable on bankruptcy or alienation, under a will which conferred large discretionary powers of management on the trustees, was held entitled, in the absence of special reason to the contrary, to be let into possession of the land, and to have the custody of the title deeds.

ADJOURNED SUMMONS.

George Wythes of *Bickley Park, Kent*, and *Copt Hall, Essex*, by his will, dated the 5th of September, 1882, appointed executors and trustees, and devised to them all his real estate, upon trust, as to his *Bickley Park* estate, during the life of *George E. Wythes*, the eldest of his two grandsons, out of the rents and profits to provide for the education of the said *George E. Wythes* until he

KEKEWICH, J.
1893
In re WYTHES WEST *v.* WYTHES.

should attain twenty-one, and to accumulate any rents and profits not so applied, and upon his attaining that age to pay the rents and profits of the *Bickley Park* estate to him during his life, or until he should become a bankrupt, or should assign, charge, or incumber, or attempt or affect to assign, charge, or incumber, the same rents and profits, or some part thereof, or should do or suffer something whereby the same or some part thereof would, through his act or default, or by the action or process of law or otherwise, if belonging absolutely to him, become vested in or payable to some other person or persons; and after the determination of the trust in favour of such grandson in his lifetime the trustees were to apply the rents and profits in their discretion for the maintenance and support of such grandson and his wife (if any), and child or children and other issue, and accumulate the unapplied residue; and after the death of such grandson the trustees were to stand possessed of the *Bickley Park* estate in trust for his child or children as he should by deed or will appoint, and if there were no such children, upon the trusts declared concerning the testator's *Copt Hall* estate in favour of his grandson *Ernest J. Wythes* and his issue. The testator then devised his *Copt Hall* estate upon trusts in favour of his grandson *Ernest J. Wythes*, corresponding with the trusts of the *Bickley Park* estate in favour of his grandson *George E. Wythes*. The testator empowered the trustees and trustee of his will, "at their and his own uncontrolled discretion," during the continuance of the trusts of his will relating thereto, to maintain, manage, and improve all or any part or parts of his real estates, and lay out all or any of the surplus rents and profits directed to be accumulated as aforesaid in the maintenance, management, and improvement, by buildings, drainage, roads, or otherwise howsoever, of the hereditaments which had produced such rents and profits, or any other hereditaments held upon the same trusts, and also to demise all or any part of the real estates at such rents and subject to such covenants, and generally in all respects "upon such terms and conditions as they or he should in their or his uncontrolled discretion think fit." The testator also provided that the trustees or trustee of his will should have a power of

sale and exchange over all or any of the hereditaments therein-before devised on trusts exercisable during the life of any tenant for life in possession of the premises proposed to be sold or exchanged with his consent in writing, and as to such premises during the minority of any child or children of such tenant for life at the discretion of the trustees or trustee. And after conferring large powers of management on the trustees in connection with his business and otherwise, the testator authorized them to transact all matters and concerns respecting his business and estate, and to do or cause to be done all acts relative thereto in such and the same manner to all intents and purposes as if such trustees or trustee were absolutely interested therein, and as he (the testator) could have done if living, it being his intention to give such trustees and trustee the amplest possible discretionary power with reference to the disposition and management of his business and concerns in any contingency, however unforeseen, which might arise, and without such trustees or trustee being answerable to any persons interested under his will for the exercise of such discretion as was thereby given to them or him, or the mode in which they or he might carry into effect any such powers.

The testator died in 1883. His grandson, *George E. Wythes*, died a bachelor in 1887.

The *Bickley Park* estate was subject to a mortgage for £80,000.

Ernest J. Wythes had attained the age of twenty-one years. It did not appear that he had become bankrupt, or had in any way assigned, charged, or incumbered, or affected to assign, charge, or incumber, the rents and profits of the *Bickley Park* or *Copt Hall* estates.

The *Bickley Park* estate was a building estate. The *Copt Hall* estate was agricultural, and was let on lease.

This was a summons by *Ernest James Wythes* asking that he might be let into possession and into the receipt of the rents and profits of the *Bickley Park* and *Copt Hall* estates, on his undertaking to pay and keep down, out of the rents and profits of the *Bickley Park* estate, the interest upon the mortgage for £80,000; and that the trustees might deliver to him the deeds and documents of title relating to the two estates respectively,

KEKEWICH, J.
1893
In re WYTHES.
WEST *v.* WYTHES.

including the counterparts of current leases and agreements for leases (but not including the probate of the testator's will and a deed of disclaimer by one of the persons named as trustees), the Applicant undertaking not to part with such deeds and documents without the consent of the trustees, and to produce them to the trustees upon all reasonable occasions.

Sir *J. Rigby*, S.G., and *Leverson*, for the Applicant:—

We submit that the Applicant, being an equitable tenant for life whose estate is determinable on bankruptcy or alienation, is a person entitled to exercise the powers of a tenant for life within sect. 58, sub-sect. vi., of the *Settled Land Act*, 1882, and is, therefore, entitled to be let into possession.

The *Settled Land Act*, 1882, has in effect revolutionized the law. It has invested an equitable tenant for life such as the Applicant with the amplest powers of management; and he ought to be placed in a position which will enable him to judge as to the propriety of exercising these powers. To that end it is necessary that he should have the control of the property, and be in immediate communication with the tenants. He must, therefore, in the absence of clear reason to the contrary, be let into possession and have the custody of the title deeds. No such reason exists here.

Of the cases before the *Settled Land Act*, 1882, *Tidd* v. *Lister* (1) is that which is most against the Applicant. There it was held that an equitable tenant for life ought not to be let into possession. The case proceeded to some extent on the circumstance that the tenant for life was a *feme covert*, and that if her husband were let into possession the protection which the Court could afford her would be diminished; but it went, no doubt, also on the ground that it was undesirable to deliver over the estate to a *cestui que trust* for life unprotected against the bias which he must naturally have to prefer his own immediate interest to the fair rights of those who were to take in remainder. But that ground of objection is now met by the provisions of the Act. Moreover, the judgment in *Tidd* v. *Lister* clearly shews that the question is one of the intention of the settlor or testator,

(1) 5 Madd. 429.

and that the Court will always let an equitable tenant for life into possession where there are special circumstances justifying that course. In *Baylies* v. *Baylies* (1), although the will directed that the trustees should receive the rents, repair the property, and pay the balance to the equitable tenant for life, he was, nevertheless, let into possession on giving security. So in *Hoskins* v. *Campbell* (2), equitable tenants for life, including married women entitled for their separate use with a restraint on anticipation, were let into possession. In *Taylor* v. *Taylor* (3) (which is really, for the present purpose, *Tidd* v. *Lister* (4) over again), Sir *G. Jessel*, M.R., summarised the cases, and laid down the law that the Court has a judicial discretion as to giving possession upon proper terms to the equitable tenant for life.

Suppose, previously to the *Settled Land Act*, 1882, a will had conferred on the equitable tenant for life powers similar to those now conferred by that Act, can it be doubted that the Court would have let such tenant for life into possession?

The only case upon the point decided since the *Settled Land Act* is *In re Bentley* (5), where Mr. Justice *Pearson*, proceeding to some extent under the Act, held that the equitable tenant for life was entitled to be let into possession and management upon her undertaking to see to the repairs, but required that trustees of the settlement should be appointed, and that notice of the intention to exercise the powers should be given to them. In this case notice has been duly given to the trustees, so that the Applicant has placed himself in the position in which Mr. Justice *Pearson* considered that the tenant for life ought to be.

In the earlier cases the tenant for life, on being let into possession, has been required to give security; but it is now considered to be sufficient that he should sign an inventory: *Temple* v. *Thring* (6).

As to the title deeds, the only decided case is *In re Burnaby's Settled Estates* (7), where Mr. Justice *Stirling* gave the custody of the title deeds to the equitable tenant for life upon his entering into an undertaking similar to that now proposed.

(1) 1 Coll. 537.
(2) W. N. (1869) 59.
(3) Law Rep. 20 Eq. 297.
(4) 5 Madd. 429.
(5) 54 L. J. (Ch.) 782.
(6) 56 L. T. (N.S.) 283.
(7) 42 Ch. D. 621.

KEKEWICH, J.

1893

In re WYTHES. WEST *v.* WYTHES.

Renshaw, Q.C., and *R. J. Parker*, for the trustees.

Warmington, Q.C., and *Munns*, for reversioners.

1893. March 4. KEKEWICH, J.:—

It would not have been satisfactory to make such an order as is asked in Chambers. The matter deserved the full attention which it has received in open Court. Inasmuch as there was no hostile argument, there is no occasion for me to go through the authorities, or to recapitulate the rules deducible from them, or to explain in detail how far recent legislation has qualified them or rendered them inapplicable. On the other hand, it must be borne in mind that the Applicant's case was placed before the Court by the Solicitor-General as fully and with as much precision as if he was encountering opponents, and counsel for the trustees were prepared to insist on any point, requiring consideration, not thus brought out. And not only during the arguments, but since, I have thought it my duty to reflect on the case made by the Applicant, and to consider all the authorities cited with special reference to the provisions of the *Settled Land Acts*, on which the Applicant's case was rested. My conclusion is that the Solicitor-General's argument is sound, and that the old authorities, of which *Tidd* v. *Lister* (1) may be taken to be the type, and which were summarised by the late Master of the Rolls in *Taylor* v. *Taylor* (2), may be treated as largely, if not altogether, abrogated by the Acts just mentioned. I must not be understood as saying that even now an equitable tenant for life, where the trustees in whom the legal estate is vested have duties of management and the like to perform, is entitled, as a matter of course, to be let into possession; but I intend to hold that the powers granted to and the duties imposed on a tenant for life, as defined by the *Settled Land Acts* (which definition clearly includes an equitable tenant for life, such as the Applicant), have raised a presumption in favour of the title to possession which did not before exist, and have made it incumbent on the Court to provide that, if the estate and the trustees can be adequately protected by reasonable safeguards, an equitable

(1) 5 Madd. 429. (2) Law Rep. 20 Eq. 297.

tenant for life shall be let into possession and be enabled personally to exercise these powers and discharge these duties unless there be found some reason to the contrary far more urgent than is disclosed by any of the terms of this will. The point is in a great measure new. It was before Mr. Justice *Pearson* in *In re Bentley* (1), and I have no doubt, from a perusal of his judgment, that he would have decided this case as I am now deciding it. The title to possession once established, the custody of the title deeds appears to follow, unless, of course, there is in any particular case reason for distinction. As regards the deeds, the case of *In re Burnaby's Settled Estates,* before Mr. Justice *Stirling* (2), is distinctly in point. There was no opposition there; but the arguments for the applicant were based on the provisions of the *Settled Land Acts,* and the learned Judge must be taken to have assented to them as I do.

The following are minutes of the material parts of the Order:—

The Applicant by his counsel undertaking in manner following—that is to say: I. To insure and keep insured against loss or damage by fire in the names or name and to the reasonable satisfaction of the trustees or trustee for the time being of the testator's will, (1.) the plate, fixtures, furniture, and household effects comprised in the inventory hereinafter directed to be signed by him when the same shall be delivered to him as hereinafter provided; (2.) [certain other plate, fixtures, furniture, and household effects]; and (3.) all messuages or buildings now erected or hereafter to be erected on the testator's *Copt Hall* and *Bickley Park* estates or either of them, other than such messuages or buildings as may for the time being be insured by the lessees or tenants thereof respectively in accordance with the provisions of their respective leases or agreements of tenancy; II. From time to time to execute in connection with all or any of such messuages or buildings such repairs as may be necessary or proper; III. To do all things which may be necessary or proper to keep such parts of the said estates as are for the time being unlet in a proper state of cultivation, and not to cut down any timber or timber-like trees growing on any part of the said estates or either of them without the consent in writing of the said trustees or trustee; IV. To pay all outgoings in respect of the said estates and keep down the interest on all charges or incumbrances on the said estates or either of them or any part thereof respectively [excepting an incumbrance otherwise provided for]; V. Not to part with any policy of insurance effected as hereinbefore provided, or any receipt for the payment of any premium in respect thereof, or any of the muniments of title hereinafter mentioned, without

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(1) 54 L. J. (Ch.) 782. (2) 42 Ch. D. 621.

KEKEWICH, J.
1893
In re WYTHES. WEST *v.* WYTHES.

the written consent of the said trustees or trustee, and also to produce every or any such policy, receipt, or muniment to the said trustees or trustee upon all reasonable occasions; VI. To permit the said trustees or trustee or their or his agents at all reasonable times to enter and inspect such parts of the said estates as may be in the possession of the Applicant, and from time to time to supply to the said trustees or trustee all such information as they or he may reasonably require with respect to the said estates and each of them; VII. To purchase from the respondents, the trustees (without prejudice to the manner in which the purchase-moneys ought to be credited in the trustees' accounts) the live and dead stock belonging to the trustees on the farms now being carried on by such trustees at a valuation to be made by some person to be agreed on between such trustees and the Applicant; VIII. So long as the Applicant remains in possession or receipt of the rents and profits of the said estates, to keep the said trustees indemnified against any personal liability by reason of any covenant, contract, or obligation properly entered into or incurred by them as such trustees as aforesaid in connection with the said estates or either of them, the said trustees, so soon as they can, supplying the Applicant with information as to every such covenant, contract, or obligation;

Let the Applicant be let into possession and into receipt of the rents and profits of the said *Copt Hall* and *Bickley Park* estates, and let the Respondents, the trustees of the said will, deliver to the Applicant the plate, pictures, furniture, and household effects by the said will settled upon trusts corresponding with the trusts and limitations therein declared of the said *Copt Hall* estate (an inventory thereof being first signed in duplicate by the Applicant, and one copy of such inventory so signed as aforesaid being delivered to the Respondents, the trustees), and also all muniments of title in their possession relating to the said estates or either of them, including the counterparts of the current leases and agreements for leases or tenancies (but not including the probate of the said will or the disclaimer of the trusts thereof by *George Woolcott*), a schedule of the muniments to be delivered to the Applicant as aforesaid, being first signed by the Applicant and delivered to the Respondents, the trustees.

Solicitors: *Upton, Atkey, & Upton; Field, Roscoe, & Co.*, agents for *Smith, Pinsent & Co., Birmingham; Munns & Longden.*

C. C. M. D.

HOLLINRAKE *v.* TRUSWELL.

WRIGHT, J.

1893

March 14, 15, 18.

[1892 H. 1487.]

Copyright—Books—"Map, Chart, or Plan"—Pattern Sleeve—Subject-matter—Literary Merit—Copyright Act (5 & 6 *Vict. c.* 45), *ss.* 1, 2.

The Plaintiff claimed copyright in a cardboard pattern sleeve containing a scale for adapting it to sleeves of any dimensions:—

Held, that it was capable of copyright under 5 & 6 Vict. c. 45, as a chart or plan.

THE Plaintiff, Mrs. *Hollinrake*, was the assignee of the copyright in a cardboard pattern entitled the *Cosmopolitan Sleeve Chart*, 1886, first published by one *Kendall* on the 18th of November, 1886.

The copyright and the assignment were duly registered at *Stationers' Hall.*

The Defendant, Mrs. *Truswell*, sold and published a sleeve chart called the "*Ideal*," which the Plaintiff alleged to be an infringement of her copyright.

The Plaintiff brought this action to restrain such alleged infringement.

It appeared from the evidence that the sleeve of a lady's dress is cut out in two parts, an outer side and an inner side, and that the outer side is wider than the inner. The *Cosmopolitan Sleeve Chart* was a cardboard pattern of the outer side of a lady's sleeve, and by means of a system of lines and figures printed on its surface a scale was provided which enabled any person instructed in the use of the chart to cut a complete sleeve for an arm of any dimensions, without making any arithmetical computation or taking any measurements beyond the length of the arm and the girth of the arm at certain fixed points.

The chart contained no letterpress except the title and a few words explaining the several lines and figures printed upon it, such as "Under curve line," "Top curve line, "Measure round thick part of the arm." The chart was of great practical utility, and could be worked without any excessive amount of instruction.

The Defendant pleaded, amongst other defences, that the

WRIGHT, J.
1893
HOLLINRAKE v. TRUSWELL.

Plaintiff's design was not a book or sheet of letterpress, or a map, chart, or plan, within 5 & 6 Vict. c. 45 (1), and could not be the subject of copyright.

Arthur J. Walter, for the Plaintiff.

Bramwell Davis, for the Defendant, raised the preliminary point of law that the Plaintiff's chart was not capable of copyright.

There can be no copyright in a pattern sleeve under 5 & 6 Vict. c. 45. It has no literary merit; it is not a book in the ordinary meaning of the word; neither is it a sheet of letterpress, or a map, chart, or plan within the Act. This Act, as appears from the preamble, and also from the general tenour of its language, was intended for the encouragement of literature, and it is essential, in order to entitle a thing to protection under the Act, that it should have some literary merit.

The Plaintiff's device is more properly the subject of a patent than of copyright.

It has been held that there can be no copyright in the printed face of a barometer: *Davis* v. *Comitti* (2); or in a cricketing scoring-sheet: *Page* v. *Wisden* (3); or in a cardboard puzzle called a "Christograph," so constructed as to throw a shadow resembling the picture "*Ecce Homo*": *Cable* v. *Marks* (4); or in an illustrated photograph album: *Schove* v. *Schmincké* (5). A map or chart is included in an Act dealing with literary copyright, only because it conveys information in the same way as a book does; a map is intended to give geographical and historical details; a chart to give sailing instructions to mariners: *per James*, L.J., in *Stannard* v. *Lee* (6).

(1) Sect. 1, which is repealed by the *Statute Law Revision Act*, 1874 (No. 2) (37 & 38 Vict. c. 96), commences as follows:—"Whereas it is expedient to amend the law relating to copyright and to afford greater encouragement to the production of literary works of lasting benefit to the world."

By sect. 2: "'Book' shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published."

(2) 52 L. T. (N.S.) 539.

(3) 20 L. T. (N.S.) 435.

(4) 52 L. J. (Ch.) 107.

(5) 33 Ch. D. 546.

(6) Law Rep. 6 Ch. 346.

WRIGHT, J., declined to stop the action, and the case was then argued on the merits.

WRIGHT, J. (after holding that Plaintiff's chart had not been anticipated, and that the Defendant's chart was an infringement of it, proceeded):—

Very serious questions of law arise in this case. The Act 5 & 6 Vict. c. 45, deals with various things. I do not think that the Plaintiff's pattern comes within the word "book" or the word "letterpress." The only words that appear to me to fit it at all are the words "map, chart, or plan." In the first place, it is said by Mr. *Bramwell Davis*, and said with great force, that this is partly a mechanical device, and that it is more properly the subject of a patent than the subject of registration under the *Copyright Act*; but I do not think that that of itself will prevent the application of the Act. A scale may be part of a map or plan, and it may be so constructed, and often is so constructed, as to be movcable on the map or plan, either actually moveable, although attached to it by a pin, or by some other means, or capable of being applied to various parts of the map by folding over into a suitable position. I do not think there is anything in the fact that this pattern might be made the subject of a patent which would take it out of the category of a "map, chart, or plan," if it is otherwise within those words.

Then, is it a map, chart, or plan? First of all, I think a "map, chart, or plan" need not necessarily be topographical. I think you may have a chart shewing various things which would not be topographical at all which might yet be within the Act. I think a chart shewing the relations of the stars or heavenly bodies to each other, or shewing the harmonies of colours, or the lines of electrical action, or types of physiognomy, or the artistic principles of proportion, or molecular proportion or atomic proportion, or very many other things of that sort, might be so constructed as to be capable of protection under this statute as a "map, chart, or plan." And this, I think, may be regarded either as a chart or plan of the female arm in relation to dressmaking, or as a plan of a pattern or model sleeve.

Then it is said that the preamble of the Act shews, and

WRIGHT, J.
1893
HOLLINRAKE v. TRUSWELL

that the whole purport of the Act shews, that it refers to maps, charts, or plans having literary merit. The object of the Act, no doubt, as stated in the preamble, was to encourage literary merit; but it frequently happens that Acts of Parliament are wider than their preambles. Sometimes a preamble is retained in a consolidating or an amending Act, although the substance of the Act is much enlarged. Even if this is not within the preamble of the Act, and even if literary merit is necessary, I think it would be taking too narrow a view of the language of the Act if I were to hold that a thing of this kind could not possess literary merit.

In my opinion, literature is not properly confined to notation by words or numbers, but may extend to all notations by figures in a form suitable for dissemination, in the way in which notations by words are ordinarily disseminated. And, although this is not in form like a usual kind of map, chart, or plan, and would not ordinarily be described as a thing connected with literature at all, still I think it would be too narrow a view to hold that, in order to entitle a map, chart, or plan to protection under this Act, it must have anything like literary merit in the popular sense of the term, or any literary character at all.

For these reasons, although with great difficulty, I think I must decide against Mr. *Bramwell Davis's* contention. There will be judgment for the Plaintiff with costs.

Solicitors for Plaintiff: *Firth & Co.*
Solicitor for Defendant: *H. S. Holt.*

H. B. H.

NORTH AUSTRALIAN TERRITORY COMPANY *v.* GOLDSBOROUGH, MORT AND COMPANY.

C. A.
1893
March 1.

[1889 N. 1563.]

Practice — Discovery — Inspection of Documents—Company—Winding-up—Examination of Witnesses under Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 115—*Right to Inspection of Depositions.*

The Plaintiffs, a company in liquidation, brought an action against the Defendants to obtain rescission of a contract for the purchase of real property. In the course of the liquidation and after the commencement of the action certain persons were examined under sect. 115 of the *Companies Act,* 1862, and their depositions were duly taken. A commission subsequently issued in the action for the examination of witnesses abroad, and one of the persons who had been examined under sect. 115 was examined under the commission on behalf of the Defendants. During his cross-examination on behalf of the Plaintiffs he was asked as to the truth of certain of his answers given in the examination under sect. 115, and the answers were read to him from the depositions. He said that the statements contained in them were correct. He was also cross-examined as to certain answers given by other persons who had been examined under sect. 115, and those answers were read to him. The Defendants having taken out a summons for leave to inspect and take copies of those depositions which had been used by the Plaintiffs in the cross-examination:—

Held (affirming the decision of *Kekewich,* J.), that the Defendants were not entitled to the inspection.

APPEAL from an order of Mr. Justice *Kekewich,* refusing leave to the Defendants to inspect and take copies of certain depositions taken in an examination under sect. 115 of the *Companies Act,* 1862.

The Plaintiffs, an English company registered under the *Companies Acts,* had been formed for the purpose (*inter alia*) of purchasing certain real property in *Australia* from one *Fisher* and his mortgagees, who were the Defendants in the present action, and a contract of purchase had been duly entered into. The company proved unsuccessful, and in August, 1889, a winding-up order was made. Shortly after the commencement of the winding-up the present action was brought by the liquidator in the company's name to rescind the contract of purchase on the ground of alleged fraudulent misrepresentation

C. A.
1893
NORTH AUSTRALIAN TERRITORY COMPANY v. GOLDSBOROUGH, MORT AND COMPANY.

and deceit. After the commencement of the action an order of the Court was obtained on behalf of the Plaintiffs under sect. 115 of the *Companies Act*, 1862, for the examination of certain of their directors and officers and other persons, under which order several persons, including Messrs. *Vicary Gibbs, Charles Parbury*, and *T. Archer*, who were directors or officers of the company, and also a certain Mr. *Murray Smith*, were examined and their depositions duly taken.

In 1892 a joint commission in the action was sent out to *Melbourne* for the examination of witnesses, and among the witnesses examined under the commission on behalf of the Defendants was Mr. *Murray Smith*. During his cross-examination on behalf of the Plaintiffs he was asked whether he had made certain statements during his examination under sect. 115, to which he replied that he could not tell unless he was told what his answers were. Certain of the questions put to him and his answers to them were then read out to him, and he said that his answers were correct. He was also asked questions as to the evidence given by Messrs. *Vicary Gibbs, Parbury*, and *Archer*, when examined under sect. 115. A copy of the depositions taken under sect. 115 had been supplied by the liquidator to the counsel appearing for the Plaintiffs on the commission at *Melbourne*, for the purpose of cross-examining the witnesses called on behalf of the Defendants, but it was not shewn to Mr. *Murray Smith* or any other witness, or to the counsel who appeared for the Defendants, nor were the depositions attempted to be put in as evidence.

The depositions were not disclosed by the Plaintiffs in their affidavit of documents, and the Defendants took out a summons that they might be at liberty to inspect and take copies of the depositions taken on the examinations of *Vicary Gibbs, Charles Parbury*, and *T. Archer* by the liquidator of the Plaintiff company under sect. 115 of the *Companies Act*, 1862 (1). The application was heard in chambers before Mr. Justice *Kekewich*, who, after full argument, refused to make the order, but without prejudice to

(1) The summons was in form limited to an application for leave to inspect the depositions of Messrs. *Gibbs, Parbury* and *Archer*, but it was dealt with throughout the argument and judgment as though it included the deposition of Mr. *Murray Smith*.

any application which the Defendants might make at the trial of the action for leave to see the depositions. The learned Judge dispensed with a further argument in Court, and the Defendants appealed to the Court of Appeal.

Latham, Q.C., and *Pollard*, for the Defendants:—

The Defendants are entitled to inspect these depositions. It is admitted that depositions taken under sect. 115 are taken *ex parte* for the information of the liquidator, and that generally they are not allowed to be seen; but when they are once used in a legal proceeding the time arises when the other side is entitled to see them; if a question is asked upon such a deposition the other side is entitled to see the whole of it, not merely for the purpose of re-examining the witness, but for all the purposes of the action.

[BOWEN, L.J.:—You could not put these depositions in evidence if you had them.]

They would enable the Defendants' witnesses to be examined at the trial on the lines of the depositions. The use which might be made of such depositions is considered in *In re Greys Brewery Company* (1) by Mr. Justice *Chitty*, who, after saying that such an examination is in the nature of a secret proceeding, says (2): "It must not be for a moment supposed that when litigation arises, if it ever should, and any attempt is made to make use of the examination, the whole matter will not be then dealt with in public; and all parties who are concerned in any summons in the winding-up, or the like, against whom the examination is sought to be made use of, so far as it can, will then be at liberty to examine and cross-examine in any way they may think fit. The examination is, as I have said, for information; and I am not even prepared to say that the examination of the witness can on notice be read as against any party concerned in any subsequent litigation that occurs in the winding-up. Certainly it could not be used in any proceeding which is not in the winding-up, nor used in bankruptcy. . . . These powers can never be so used as to work injustice to anybody." In the present case it would be unjust

(1) 25 Ch. D. 400. (2) 25 Ch. D. 408.

C. A.
1893
NORTH AUSTRALIAN TERRITORY COMPANY v. GOLDSBOROUGH, MORT AND COMPANY.

that the Defendants should not see the depositions which the Plaintiffs have already made use of against them.

[LORD ESHER, M.R.:—Not as evidence; but in order to lay a foundation for contradicting the Defendants' witnesses at the trial, if necessary.]

If the Defendants have no absolute right to an inspection the Judge ought in the exercise of his discretion to have allowed it.

The depositions should have been disclosed in the Plaintiffs' affidavit of documents, when, if privilege were claimed, the Defendants would contend that the Plaintiffs had waived their privilege by using the depositions.

[They also cited *Heiron's Case* (1); *In re Gold Company* (2).]

Warmington, Q.C., and *C. E. E. Jenkins*, for the Plaintiffs, were not called upon.

LORD ESHER, M.R.:—

I am of opinion that this appeal must be dismissed. The Plaintiff company, who are in liquidation, brought an action against the Defendants, and subsequently obtained an order of the Court under sect. 115 of the *Companies Act*, 1862, for the examination of certain of the directors and officers of the Plaintiff company and of Mr. *Murray Smith*, and the examination took place in due course. It has been suggested that the examination could not properly take place after the commencement of litigation, but the objection was not persisted in, and there is no such limitation in the Act of Parliament. If the examination were before action brought it would enable the company by their liquidator, or perhaps I should say the liquidator on behalf of the company, to consider whether it was desirable to bring the action, and if it took place after litigation, to consider whether it was worth while to proceed with it; there is nothing in the section to shew that any distinction is drawn between the reasons which might influence the decision on the one hand to commence an action, or on the other hand to continue it. In the present case the action went on after the examination, and in due course

(1) 15 Ch. D. 139. (2) 12 Ch. D. 77.

a commission issued for the examination of certain witnesses in *Melbourne*; it was an ordinary commission for the examination of witnesses abroad; and the examination under it ought to be conducted as though the witnesses were being examined before the Court at the trial of the action. Among others who were examined and cross-examined under the commission was Mr. *Murray Smith*, who was asked in cross-examination whether in the course of his examination under sect. 115 he had not said certain things; to this he said that he did, and therefore he did not contradict his previous answers. There was, therefore, no occasion to contradict him on this point; but if there were such occasion what would have been the proper course to pursue? He is asked whether on the previous examination he was not asked a certain question, and whether it and his answer were not taken down, to which he answers yes; he is then asked whether he said a certain thing in his answer, and replies that before answering he wants to see or hear what was taken down. He has no right to require that; he is bound to say whether he denies it or not. If he denies what he is alleged to have said in his previous examination, he can be contradicted; but how is that to be done? By reading in contradiction what he said before; but if this is done, the document which contains what he said before must be put in as evidence for the purpose of contradicting him, and if a part of the document is put in, the whole is put in. It is essential that if such a document is to be used for the purpose of contradicting a witness, it should be read to him, that is, after he has given his answer; and if that is done, and the document is used to contradict him, the whole must be put in evidence.

But in the present case the witness when examined under the commission was also asked questions as to what other people had said in the previous examination under sect. 115; that is, he was told what they had said, and was asked whether he contradicted their evidence. Such questions ought never to have been put; they were objected to, and the commissioner, who had no power to disallow them, took down the objections as he was bound to do. If at the trial before the Court an endeavour were made to read these questions and answers, the Court would at once say that such questions ought never to have been asked, and would

C. A.
1893
NORTH AUSTRALIAN TERRITORY COMPANY v. GOLDSBOROUGH, MORT AND COMPANY.
Lord Esher, M.R.

decline to admit them as evidence; therefore the answers could never be given in evidence at all. It comes then to this, that answers given in an examination under sect. 115 never can be used as evidence or as proof, except for the purpose of contradicting a witness; they are not taken as evidence in an action, but for the purpose of obtaining information to enable the company or its liquidator to decide as to the propriety of bringing or continuing an action; they are not proofs and never can be used as proofs. Therefore what Mr. *Murray Smith* said when examined under sect. 115 could not be put in as evidence in the action when it came on to be tried; it could not be put in as evidence of what he said without calling him; as I have before said, it could only be used for the purpose of contradicting him, and for that purpose it must be used in the way I have explained.

What I have said as to the way of using this information for the purpose of contradiction is really old law; it is put in the same way in *Taylor* on Evidence (1). When a witness is asked as to what he said on a previous occasion, he is bound to answer the question; he cannot insist on seeing what he previously said before he answers it; he must answer. If his answer does not contradict what he said before, it is no use pursuing the topic further; he adopts his previous answer and it becomes part of his evidence; if he does contradict it, he can be contradicted in turn by shewing him what he said before. That goes to his credit only; it proves nothing, it is only a contradiction. But his previous answer cannot be used to get rid of the evidence which he is giving unless it is read to him or he is allowed to read it, the obvious reason being to give him an opportunity of explaining the apparent discrepancy. This being so, how can the Defendants have the right to see the depositions of a person taken under sect. 115, their object being not to contradict him, for they do not know whether he will be called as a witness at the trial or not, but to see the information which the liquidator has obtained by means of the examination under sect. 115? There is no rule of law or practice which touches such a case, or which in any way recognises such a right.

We come now to the question of discretion. It is said that

(1) Sect. 1446.

under the circumstances Mr. Justice *Kekewich* ought to have allowed the Defendants to see those depositions now, on the ground that it was unjust that the one side should have the information and the other should not. But how can that be, when it is obvious that the section was passed with that very object? The depositions are in the nature of information, and there is no injustice in the fact that the person conducting a cause is in possession of information of which the other side is not. It is true that Mr. Justice *Kekewich* might have made an order for inspection now; but he has not said that he will not allow the Defendants to have it at any time, he has only declined to make the order at the present stage. Are we to overrule his exercise of discretion and to say that it is manifestly wrong? So far am I from being able to say that, that in my opinion there ought not to be inspection at the present time, and there is nothing to justify an application for it; I think, therefore, that the learned Judge exercised his discretion rightly. In my opinion there is no substance in this application, and the appeal must be dismissed. I will only add that the remarks of Mr. Justice *Chitty* in *In re Greys Brewery Company* (1) do not touch the point in the present case.

LINDLEY, L.J.:—

I am of the same opinion. The argument on behalf of the Defendants practically comes to this: that because use was made of these depositions by the Plaintiffs' counsel in *Melbourne*, the Defendants are entitled to see them. On what principle are they so entitled? It is said that they are entitled because these depositions ought to have been scheduled in the Plaintiffs' affidavit of documents as documents in their possession relating to matters in dispute in the action; but, if they had been scheduled, privilege would as a matter of course have been claimed for them, and the Defendants would never have seen them; and it would not be fair to the Plaintiffs if we were to treat these depositions as documents in their possession unprotected by a claim of privilege. Whether they were in the Plaintiffs' possession I do not pause to consider, but it is perfectly clear to

(1) 25 Ch. D. 400.

C. A.
1893
NORTH AUSTRALIAN TERRITORY COMPANY v. GOLDSBOROUGH, MORT AND COMPANY.
Lindley, L.J.

me that by no machinery of inspection could the Defendants have got at these depositions if the affidavit of documents had been drawn with reasonable care. Then it is said that it is unfair on the Defendants that they should not know the contents of these documents, but I fail to see it; to me it seems to be an attempt on the part of one litigant to discover how his opponent is going to make out his case. Mr. Justice *Kekewich* can make any order that he thinks proper as to the production of these documents at the trial, but I should certainly have made the same order that he has done upon this application.

BOWEN, L.J.:—

I am of the same opinion.

Solicitors for Plaintiffs: *Saunders, Hawksford, Bennett, & Co.*
Solicitors for Defendants: *Freshfields & Williams.*

W. J. B.

C. A.
1893
CHITTY, J.
Feb. 14, 15.
C. A.
April 21, 27.

In re POWELL'S TRADE-MARK.

Trade-mark—Registration—Rectification—Old Trade-mark—User on Packing-case—Person aggrieved—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 90.

The words "*Yorkshire Relish*" were registered as a trade-mark for sauces by *P.*, who claimed to have used them several years before 1875. He brought an action against the *B. Company*, which sold a sauce called "*London Relish*," to restrain them from using a label colourably resembling the label used by him for his "*Yorkshire Relish*," but not complaining of their violating his registered trade-mark. The *B. Company* moved to expunge *P.'s* registered trade-mark "*Yorkshire Relish*," complaining that it embarrassed them in their trade; and that the words had not been used before 1875 as a trade-mark.

The Applicants stated that although they did not now sell *Yorkshire* Relish, they might possibly do so if the words were removed from the register. With respect to the user of the trade-mark before 1875, *P.* produced evidence to shew that he had been in the habit before that date of packing his bottles of sauce in packing-cases on which the words "*Yorkshire Relish*" were stencilled without any other device; that those words were recognised by the trade and the public as denoting his sauce and no other, and that he had used them as a trade-mark. *P.* had other

registered trade-marks containing the words "*Yorkshire Relish*," with the device of a willow-pattern plate:—

Held (affirming the decision of *Chitty*, J.), first, that the *B. Company* were persons aggrieved within the meaning of the *Patents, Designs, and Trade Marks Act*, 1883, s. 90, although no proceedings had been actually instituted against them for violation of *P.*'s registered trade-mark; and, secondly, that the words "*Yorkshire Relish*" had not been used by *P.* as a trade-mark before 1875, and ought to be expunged from the register.

ON the 1st of March, 1876, *W. Powell*, on behalf of the firm of *Goodall, Backhouse & Co.*, registered a trade-mark for sauces, No. 3102, consisting of the device of a willow-pattern plate, and on the same day registered another trade-mark for sauces, No. 3101, consisting of a label which comprised the words "*the celebrated Yorkshire Relish*," and the same device of a willow-pattern plate. In both instances the user of the marks was claimed for twelve years before 1875.

On the 22nd of April, 1884, *W. Powell*, trading as *Goodall, Backhouse & Co.*, registered as a trade-mark, as No. 37,030, the words "*Yorkshire Relish*," claiming a user of eleven years before 1875.

In 1891, *Powell* commenced an action against the *Birmingham Vinegar Brewery Company* to restrain them from using a label containing the words "*London Relish*," which he alleged was a colourable imitation of his label; but he did not claim against them as violating his trade-mark No. 37,030.

On the 14th of February, 1893, the *Birmingham Vinegar Brewery Company* moved before Mr. Justice *Chitty* to rectify the register of trade-marks by expunging the trade-mark No. 37,030. Mr. *Leslie*, the manager of the company, made an affidavit, in which he stated that he had been acquainted with *Yorkshire* Relish for twenty years, and that he had never seen or heard the words "*Yorkshire Relish*" used alone, but only in conjunction with *Powell's* willow-pattern label and a stopper label and paper wrapper in which the bottles were sold, and he further stated that *Powell's* firm, "by reason of their wrongly-registered trade-mark, have narrowed, and are narrowing, the area of business open to the *Birmingham Vinegar Brewery Company, Limited*, and are excluding the said company from a portion of the trade into which they desire to enter, and that the rights of the said

C. A.
1893
In re POWELL'S TRADE-MARK

company as persons who are engaged in the same trade as the said *Goodall, Backhouse & Co.*, are restricted by the retention on the register of the wrongly-registered mark, and damage is thereby caused to the said company."

On the other hand, affidavits were filed by the Respondent *W. Powell*, stating that before 1875 thousands of cases containing *Yorkshire* Relish were sent out marked with the words "*Yorkshire Relish*," and nothing else. In some instances, but not all, there was a number on the case for book-keeping purposes; and that his customers always regarded the words "*Yorkshire Relish*" stencilled on the cases as *Goodall, Backhouse & Co.'s* trade-mark. Affidavits were also filed by several persons and other traders to the effect that they had known the words "*Yorkshire Relish*" as applied to sauce for many years, and that such words had been always understood by the trade and the public as denoting *Goodall, Backhouse & Co.'s* sauce and no other; and that if any one were allowed to use the term "*Yorkshire Relish*" in connection with sauce which was not made by that firm, it would be a fraud on the public, and would lead to such sauce being passed off as sauce of *Goodall, Backhouse & Co.'s* manufacture. The Respondent also stated in his cross-examination in Court that the words "*Yorkshire Relish*" were placed on the case as a trade-mark, and that he had seen some of the cases in the shops of dealers so placed that customers could see those words on them.

Farwell, Q.C., and *Fothergill*, for the Applicants:—

We are rivals in trade, and might wish to use the Respondent's words, "*Yorkshire Relish*." One trader, by means of a wrongly-registered trade-mark, has no right to narrow the area of business open to his rivals, and, *primâ facie*, rival traders are "persons aggrieved," according to Lord Justice *Fry* in *In re Apollinaris Company's Trade-marks* (1). It is said that we cannot use the words "*Yorkshire Relish*" without committing a fraud; that is no answer to this application: *Thompson* v. *Montgomery* (2).

Secondly, has there been any real user of these words alone as a trade-mark before the 13th of August, 1875? We say No. The Respondents never used these words alone on their goods,

(1) [1891] 2 Ch. 186, 225. (2) 41 Ch. D. 35.

but always in combination with something else; in fact, their registered trade-mark is the willow-pattern plate. User of these words on the packing-cases is not sufficient: *Richards* v. *Butcher* (1).

Aston, Q.C., and *J. Cutler*, for the Respondent:—

Though a rival trader is, *primâ facie*, an aggrieved person, yet this may be rebutted by shewing that the person complaining never could carry on any legitimate trade in the article in question. Here the Applicants could not carry on any legitimate trade of their own in a sauce called "*Yorkshire Relish.*" In *Thompson* v. *Montgomery* (2) and in the *Apollinaris Case* (3), the applicants were defendants in actions pending against them, and, of course, were persons aggrieved. User on a packing-case, or outside wrapper, is sufficient; a trade-mark on a packing-case is none the less a trade-mark because the goods inside have another trade-mark upon them. You can have a trade-mark for your wholesale trade just as much as for your retail trade.

[*Jay* v. *Ladler* (4) and *Ford* v. *Foster* (5) were also referred to.]

Ingle Joyce, for the Comptroller.

Farwell, in reply, on the question of user:—

The packing-cases were merely for the purposes of safe carriage of the bottles containing the sauce, and were never used in the same way as boxes containing cigars, or boxes containing furs and sealskins, as in *Jay* v. *Ladler*. The goods were not introduced to the public by the words on the packing-cases, but by the marks on the bottles. The fact that the goods are known to the public under the particular name of "*Yorkshire Relish*" is not user.

CHITTY, J.:—

The first question is whether the Applicants are persons aggrieved within the 90th section of the Act of 1883. They

(1) [1891] 2 Ch. 522, 545.
(2) 41 Ch. D. 35.
(3) [1891] 2 Ch. 186.
(4) 40 Ch. D. 649, 653.
(5) Law Rep. 7 Ch. 611, 634.

C. A.
1893
In re POWELL'S TRADE-MARK.
Chitty, J.

carry on a rival business in the same class of goods, so far as the trade-mark is concerned, as the Respondent. It was decided in the *Apollinaris Case* (1) that any person who is in the same trade as the person who has wrongfully registered a trade-mark, and who desires to deal in goods covered by the wrongful registration, is, *primâ facie*, a person aggrieved. But in the course of the judgment delivered by Lord Justice *Fry* for the Court, he stated that the *primâ facie* grievance might be rebutted by shewing that, by reason of some circumstances entirely independent of the trade-mark, the persons complaining never could carry on any trade in the article; adding, that the burden of tendering such proof, was on the man who claimed the mark, and in the case before the Court, the burden had not been discharged. The Respondent endeavours to bring the case within that exception, and on this ground. He gives evidence the object of which is to shew that the term "*Yorkshire Relish*," which has been registered, could not be used by the Applicants without fraud on the public. It appears to me that that evidence is not sufficient to bring the case within the exception to which I have referred. If the Applicants should endeavour to make a fraudulent use of the term "*Yorkshire Relish*," the Applicants will be responsible for their fraud. What they seek to do is to get rid of the mark itself which stands in their way, embarrassing their trade. If they succeed in their application and get rid of the trade-mark, they will still render themselves liable, if the facts should be sufficient to prove the case, to any action that may be brought upon the ground of fraud. *Thompson* v. *Montgomery* (2), the "*Stone Ale*" case, affords an excellent illustration of what I am saying, because there the person who applied, and applied successfully, to strike out the trade-mark "*Stone Ale*," was not merely contemplating a fraudulent use of the term, but was actually making a fraudulent use at the time, and an injunction went against him. The kind of injunction which it is proper, as pointed out by the House of Lords, to grant in such cases, is to restrain the man who, apart from trade-mark, is using a term of this kind, from using it without clearly distinguishing his goods from the goods of the plaintiff. On these grounds, I hold that

(1) [1891] 2 Ch. 186. (2) 41 Ch. D. 35.

the Applicants are persons aggrieved, and entitled, therefore, to make the application.

The second point is whether the term "*Yorkshire Relish*" was used as a trade-mark before the 13th of August, 1875, and it must be shewn, in order to support the trade-mark as registered, that it has been used as a separate mark. I need not say that the mark cannot stand as a new mark for reasons which are obvious. Now, this question of user is a question of fact. The only user which the Respondent has shewn is by marking on packing-cases the words "*Yorkshire Relish.*" There may be some slight defect in the Respondent's evidence, but I think the substance of it in this respect works out favourably to the Respondent, and that the true effect of the evidence is, that it was the practice of the firm for many years prior to the 13th of August, 1875, to send out the goods in packing-cases which had the words "*Yorkshire Relish*" impressed thereon by means of a stencil plate. As was pointed out by Mr. *Aston*, in some instances the term was put upon the four sides of the packing-case. But, on this question of fact, I am not to regard merely the packing-cases, and I do not propose to lay down any absolute rule upon the question of placing of a trade-mark on the packing-cases. It is plain the trade-mark may be so impressed. But I have to take into consideration the other circumstances of the case and the other facts before me. The packing-cases contained inside them the bottles with the sauce, and I have here before me an exhibit which shews substantially how the sauce was put upon the market, so far as regards the bottles. The exhibit is not an exhibit of a bottle that was actually used before 1875, but it is put forward on the part of the Applicants as a fair sample of the kind of bottle, and labels on bottles, that were, in point of fact, used. Mr. *Powell* and his witnesses who have given evidence have, by their silence, admitted the substantial accuracy of this part of the case. Now, on the bottles themselves, there are the words "*Yorkshire Relish,*" and the name of the firm, "*Goodall, Backhouse, and Co.*" These words are impressed on the bottle in the making of the bottle. Besides that, I have that which is undoubtedly a trade-mark, which was subsisting at the time, placed over the cork and on the side of

C. A.
1893
In re POWELL'S TRADE-MARK.
Chitty, J.

the bottle. For some twelve years or so before the Respondent registered the simple term "*Yorkshire Relish*," he had registered a trade-mark which may be shortly described as a "*Willow Pattern Plate*." On the side of the bottle there is an example, in the shape of the label, of this trade-mark. There is the plate with "*Yorkshire Relish*" against it, and "*Trade Mark Registered, Willow Pattern Plate*," and over the cork there is a label of a similar kind. The goods, therefore, were sent out in the manner which I have described.

It was truly observed for the Respondent that a man may have two trade-marks, and that he may put one trade-mark upon the bottles, or the internal covering of the goods, and another on the external covering, or outer case. That proposition may be readily admitted; but the question is whether the mere putting of the words "*Yorkshire Relish*" on the case is sufficient to shew user of the trade-mark as such. It is noticeable that, though the term "*Trade Mark*" is pointedly used on the bottles, and labels on the bottles, that term is not to be found on the external case. The practice of the firm is well shewn by the Respondent's affidavits. They deal in other goods besides "*Yorkshire Relish*," and, as Mr. *Jackson*, a witness for the Respondent, and who was in the employ of the firm, states, it was his duty ever since he entered the employment of the firm to carefully inspect and examine all cases of the different goods, including the sauce known as "*Yorkshire Relish*" sent out by his employers, for the purpose of seeing that such cases were marked with proper marks according to the instructions given to him by his employer. It results from this that the cases containing the various kinds of goods were marked with the description of the goods that were to be found inside them. There is no direct evidence that that was done for the purpose of instructing those to whom the actual packing of the goods was entrusted, to put the particular kind of goods into the particular packing-case; but the inference is strong to shew that that was an object in marking the cases. It is a strong fact in the case before me that the definite and unquestioned trade-mark was put upon the bottles, and that there is no indication on the external packing-cases that that which was impressed upon them was intended to represent a trade-mark.

Now, an elaborate argument was presented to me on the part of the Respondent, pointing, by way of well-known illustration, to instances of the trade-marks being put upon cases; and, as far as the instances are themselves concerned, counsel's statement may be well accepted. Cigars are sold in cedar cases, and the trade-mark is often found solely upon that case—on the outside, and in the inside. Sometimes it may be, as counsel observed, that the trade-mark, or a portion of it, has been found on a little band on the cigars themselves. So in regard to linen goods and many other goods of that class, where the trader cannot reasonably be expected to put his mark upon the goods themselves without defacing the goods. Other illustrations are taken from well-known examples with which this Court is very conversant, such as soap and candles and the like goods. All that is readily admitted. That is the common and ordinary practice. Taking candles, the better class of candles are sold in boxes, and on the boxes the trade-mark is to be found—outside often, and sometimes outside and inside. But these illustrations do not carry the point; because what I have to consider is whether the marking in the circumstances of the case (for I do not take the isolated fact) on the packing-case is sufficient to shew user. Now, what is a packing-case? It is a rough external covering of an ordinary well-known kind to protect the goods in their transit; and the common practice is either to throw away the packing-case which is injured in the opening, or, if more care is taken, to return it to the person who sent it. Those who send their goods in packing-cases, as the Respondent's firm has done, are not sellers of packing-cases. They may charge their customers for the packing-case, but the object of their dealing is to sell the sauce, or the goods, whatever they may be, which are contained in the packing-case. I have before me an illustration of what I am saying. One of the packing-cases sent out, unquestionably by the Respondent's firm, is produced in Court. It answers to the description which I have just given—a rough external covering of the ordinary kind; and it was sent back to the firm and is now produced. In some instances, no doubt, the packing-cases were not returned; the packing-cases in some instances also were sent out with a card on them containing the

C. A.
1893
In re POWELL'S TRADE-MARK.
Chitty, J.

name of the firm, serving to assist in the identification of the goods, and it may be also to assist in the return of the packing-cases in those instances where they were returned.

Now, as I have already said, the main question is one of fact. The ordinary user of the trade-mark is that user which accompanies the goods on sale in the market, the object being to denote the goods, and to distinguish the goods of the seller from the goods of other persons. As has been already pointed out by another Judge, the packing-case is not the place where you would expect to find the trade-mark. I refer to *Richards* v. *Butcher* (1), the "*Monopole*" case, not as a decision on the point, but as shewing the inclination of the learned Judges in the Court of Appeal who had to deal with this question of packing-cases. Though not a decisive opinion on the point, the present Master of the Rolls seems to have been of opinion that the mere marking on the packing-case was not sufficient. I again state, that in my opinion this is not an abstract proposition, but it is a point of fact that has to be decided in the circumstances of the particular case. He said (2): "I doubt very much whether the use on the packing-cases can be treated as a use in connection with the goods. The packing-cases were not their goods. No customer bought the packing-case as part of the transaction; on the contrary, in all probability, the packing-cases were returned." And the Lord Justice *Fry* said (3): "I think the box"—meaning, as I understand it, the packing-case; he was not referring to a box of the description which I have been dealing with in the earlier part of this judgment—"I think the box is not the place where you would expect to find the real trade-mark, the box being a thing which would probably be thrown aside at some stage in the history of the wine." And he added, whether the case generally travelled into the hands of the retail customer, he did not know.

Mr. *Powell* in his re-examination stated that he had seen some of the packing-cases in the shops, as I understand him, of retail dealers, and an ingenious attempt was made to lay great stress upon that fact. I think I am not erring in saying that counsel

(1) [1891] 2 Ch. 522. (2) [1891] 2 Ch. 545.
(3) [1891] 2 Ch. 548.

went the length of using this slight circumstance for the purpose of shewing that the packing-cases were actually used as an advertisement of the goods or as a show-card. Mr. *Cutler*, I think, said that the evidence shewed that they were placed on the counter. Mr. *Aston* was a little more modest, and said it was on the shelf. Well, the packing-cases, I take it from Mr. *Powell*, were seen in the retailer's shop; but I think the suggestion that they were used as show-cards, or in any manner as an advertisement of the goods, by the retail buyer, is really beside the question. Mr. *Powell*, upon whom I make no imputation whatever, says that he intended the words "*Yorkshire Relish*," as placed upon the packing-cases, to represent a trade-mark. I have already said that there is on the packing-case itself no indication of the intention to use it as a trade-mark, the words "trade-mark" not being there. That fact stands out strongly in contrast with the other fact, that the words "trade-mark" are inside on the bottles. As I say, I make no imputation on Mr. *Powell*; but this is a kind of evidence upon which a man may readily bring himself, after years, to believe that there was such an intention. But that intention will not do. It must be a user in fact. Again, several witnesses, some three or four, were called for the purpose of stating, as they did, that they had always regarded the words "*Yorkshire Relish*" on the packing-cases as a trade-mark. That evidence does not, to my mind, carry the case any further. That is only an opinion which they express on the present occasion with regard to their former view of the practice. That, of itself, is of little use or value at all.

Then there is evidence of several witnesses in the trade that the term "*Yorkshire Relish*" cannot be used by any one else than the Respondent's firm without a fraud being committed on the public, the evidence going so far as to shew that in the market "*Yorkshire Relish*" is a term known as denoting the Respondent's goods. But that evidence is irrelevant on the question of user. If this trade-mark is struck out, any case of that sort would remain to the Respondent. I express no opinion one way or the other about it. It does not fall within my province so to do; but I say that this evidence is not pertinent to the question of user. The words may have come to be known

C. A.
1893
In re POWELL'S TRADE-MARK.
Chitty, J.

in the market as denoting goods the manufacture of the firm. Without pretending to throw any particular doubt upon that point, I merely refer to the circumstance that on the bottles there was the name of the firm as well as the term "*Yorkshire Relish.*" The result is, that dealing with this question as a question of fact, not pronouncing an abstract opinion on the question mooted, whether the user on a packing-case may not be a sufficient use, I say that in the circumstances of this case the user has not been shewn. There was an argument which I think I have not mentioned, and if I have not mentioned it, in justice to the Respondent's counsel, I do now—the question of nullification. It was said that the use of the trade-mark inside cannot nullify a trade-mark which is outside. True; but the question is whether the user on the packing-case was a user as a trade-mark.

The result is that I think the Applicants succeed, and that the mark must be removed from the register. And the Respondent must pay all the costs, which of course includes the costs of the Comptroller, who is necessarily brought before the Court.

W. C. D.

C. A.

From this decision *W. Powell* appealed. The appeal came on to be heard on the 21st of April, 1893.

In the course of the argument Mr. *Thompson*, the manager of the Respondent company, was cross-examined in Court by the Appellant on his affidavit. He stated that if the directors of the company could legally make a *Yorkshire* Relish with their own name upon the bottles, it was possible they might do so, but he did not say that it was probable. He believed that the question of making a *Yorkshire* Relish had never been discussed by the board of directors, and he did not know whether they had any real intention to sell it.

Sir *H. Davey*, Q.C., *Aston*, Q.C., and *J. Cutler*, for the Appellant:—

The *Birmingham Vinegar Brewery Company* have no *locus standi* to make the application. They are not persons aggrieved

within sect. 90 of the Act of 1883. They do not deal, and do not say that they wish to deal, in *Yorkshire* Relish, and the Appellant's use of the words as a trade-mark does not interfere with their business: *In re Apollinaris Company's Trade-marks* (1).

But, secondly, the words were properly registered as a trade-mark. They were habitually put on the packing-cases, and the Appellant swears that they were so used as a trade-mark. The evidence of the grocers is to the same effect, and shews that the words were known in the trade and by the public as a trade-mark: *Richards* v. *Butcher* (2); *In re Palmer's Trade-mark* (3); *In re Spencer's Trade-marks* (4).

Moulton, Q.C., *Farwell*, Q.C., and *Fothergill*, for the Respondent company, were stopped by the Court.

Ingle Joyce, for the Comptroller.

LINDLEY, L.J.:—

This is an appeal from an order made by Mr. Justice *Chitty* removing from the Register of Trade Marks a trade-mark which consists simply of the words "*Yorkshire Relish*" as applied to sauces. That was put on in 1884, and the certificate, which I hold in my hand, states that Mr. *Powell*, trading under the name of *Goodall, Backhouse & Co.*, is on the register for the trade-mark 37,030 in Class 42, in respect of sauces; that he applied for it in April, 1884, and the user claimed for the trade-mark was for about eleven years before the 13th of August, 1875. The application to remove it is made under sect. 90 of the Act of 1883, the early part of which I will read: "The Court may on the application of any person aggrieved by the omission without sufficient cause of the name of any person from any register kept under this Act, or by any entry made without sufficient cause in any such register, make such order for making expunging or varying the entry, as the Court thinks fit." Now, the first question which here arises is whether the Applicants are persons aggrieved; that is to say, whether they have any *locus standi* at

(1) [1891] 2 Ch. 186.
(2) [1891] 2 Ch. 522; 8 Rep. Pat. Cas. 37, 249.
(3) 24 Ch. D. 501.
(4) 3 Rep. Pat. Cas. 73.

C. A.
1893
In re POWELL'S TRADE-MARK
Lindley, L.J.

all to complain of this trade-mark, even if it should be wrongfully on the register.

In order to consider that question we must turn to the authorities which have decided the true construction to be put on the expression "person aggrieved." The real state of things appears to be this: The Applicants are a company; they make sauces; they make *Worcester* Sauce, and they make *London* Relish. They have not considered, as I understand Mr. *Thompson*, whether they will or will not make *Yorkshire* Relish, and their position is this, that so long as "*Yorkshire Relish*" is on the Trade Marks Register it is no use considering whether they will make and sell "*Yorkshire Relish*" by that name, because they cannot do it; but if it were removed, it is possible, for anything I know, that they might; and having regard to the tests which were laid down in the *Apollinaris Case* (1), I think they are persons aggrieved in this sense—that they are entitled to ask the Court to hear the case on the merits. They have an interest in this matter: they are not common informers—they are not persons who have nothing to do with the sauce trade, and it may well be that if they can get rid of this mark they will sell *Yorkshire* Relish. Therefore, I think the first point fails, notwithstanding that there is no evidence forthcoming that they really will or do intend to make *Yorkshire* Relish. It is sufficient for them to say, "We should like to consider that when we are in a position usefully to do so."

Now I come to the next point, and that is whether this entry is improperly made on the register. In order to determine that we must go back to the section which deals with trade-marks, which is sect. 64, sub-sect. 3. Sect. 64 commences thus: "For the purposes of this Act, a trade-mark must consist of or contain at least one of the following essential particulars." Then sub-sect. 3, which is the important one, runs thus: "Provided that any special and distinctive word or words, letter, figure, or combination of letters or figures or of letters and figures used as a trade-mark before the thirteenth day of August one thousand eight hundred and seventy-five may be registered as a trade-mark under this part of this Act." Now comes the question

(1) [1891] 2 Ch. 186.

whether these words "*Yorkshire Relish*" were used as a trade-mark before the 13th of August, 1875. The evidence shews that this term "*Yorkshire Relish*" has been used by the firm which the Appellant represents to denote a sauce made by them ever since 1862, and they have got a reputation for it; but what is most important to observe is this, that they have no exclusive right to the use of the words "*Yorkshire Relish*" unless they can maintain this particular registered mark. Their right, apart from that, is to prevent anybody from selling *Yorkshire* Relish in such a way as to pass off his goods for the Appellant's. That is the whole of their right. What they are seeking to do, and what they did seek to do when they registered these words "*Yorkshire Relish*," was to extend that right and to get a monopoly of those words. That was their object, and that would be the effect if this trade-mark, as registered, stood.

Now, in what sense and to what extent was it used before 1875? The cases which have been referred to, beginning with the *Braided Fixed Star Case, In re Palmer's Trade-mark* (1), and going down to the *Diamond Cast Steel Case, In re Spencer's Trade-marks* (2), and the *Monopole Case, Richards* v. *Butcher* (3), all shew that the user as a trade-mark must be the user of that which is registered as the trade-mark alone, and not in combination with something else. What is the user here relied upon? This is sauce, sold in bottles, and the bottles are not marked "*Yorkshire Relish*" alone. Far from it. The Appellant's firm have a very elaborate label, and, as I understand the evidence, the label which they have now has been in use for a great number of years, with the exception of that white label at the bottom, to which I will refer presently. They have called their sauce "*Yorkshire Relish*"; they have put upon their bottles a label containing a willow-pattern plate, containing their own names, and containing other things; and there is a general look about that bottle which would protect them against anybody who sold similar sauce, or any other sauce under a similar name, in bottles similarly got up; but they have never used on their bottles the words "*Yorkshire Relish*" alone. The only use they have ever

(1) 24 Ch. D. 504. (2) 3 Rep. Pat. Cas. 73.
(3) [1891] 2 Ch. 522.

C. A.
1893
In re POWELL'S TRADE-MARK.
Lindley, L.J.

made of these words alone before 1875 was this: that "*Yorkshire Relish*" was put on the packing-cases in which these bottles were sold, and sold in considerable quantities. One of those packing-cases was shewn to us, and it was a large one, which would contain a good many bottles. I dare say some packing-cases were larger and some were smaller, and upon those packing-cases, and upon those alone, the words "*Yorkshire Relish*" did appear—"*Yorkshire Relish*" pure and simple, apart from the names of the makers, apart from a plate, and apart from everything else. There may have been, and I believe there were, some numbers for booking purposes, but that is nothing at all. Therefore, to that extent, they used the words "*Yorkshire Relish*" alone on the packing-cases, and that is the user on which they rely.

Now, was that user a user of those words as a trade-mark? Mr. *Powell* in his affidavit, after mentioning the practice of putting the words on, says: "'*Yorkshire Relish*' was stencilled on the packing-cases as a trade-mark, and nothing else." Then there are three witnesses, who all say that they regarded the words "*Yorkshire Relish*" so stencilled on the said cases as Messrs. *Goodall, Backhouse & Co.'s* trade-mark, and as being put on such cases as such trade-mark. That is the evidence in favour of the Appellant.

Now, what have we got against it? We have got against it circumstances which to my mind more than counterbalance the inference which possibly might be drawn from these affidavits if they stood alone. I say possibly, because when a person who has got a trade-mark says he has always used it as a trade-mark, one naturally wishes to know exactly what he means by it. However, that is what he says, and I will take it he means what one supposes he intended to convey. Now, against this evidence we have this, which is very extraordinary, that in 1876, that is to say ten or eleven years after this gentleman says that the words "*Yorkshire Relish*" had been used in the way I have described as his trade-mark, he registers what he calls his trade-mark, and he registers, not "*Yorkshire Relish*," either alone or in combination with anything else, but he registers the willow-pattern plate, and in the interval between 1876 and 1884 he sells

his bottles with the old label, as I understand it, but with the addition of a white label which runs thus, "*Yorkshire Relish*," with the willow-pattern plate at the corner, "*Trade-mark registered Willow Pattern Plate.*" Therefore, upon the bottle at all events and upon the register in 1876, and between 1876 and 1884, he tells you that his trade-mark is the "*Willow Pattern Plate.*" Now, if notwithstanding that it appeared by the evidence that the packing-cases sold the sauce in the same sense in which packing-cases do sometimes sell their contents—as when you buy a box of cigars with a particular brand on the framework of the box, that is the trade-mark of the cigars, although the trade-mark is not repeated on each cigar—if I say those words were used on the packing-case in the same sense and with the meaning as we find brands and marks on cigar-boxes or *eau-de-Cologne* cases or chocolate cases and so on; where the case sells the article, it would be very different; but, to my mind, it is perfectly hopeless for anybody to come to the conclusion which is requisite in order to establish the Appellant's case and to hold that "*Yorkshire Relish*" on the packing-cases sold the article. What sold the article was what appeared on the bottle, not the words "*Yorkshire Relish*" put on the packing-cases in the way described, four times, once on each of the four sides. No doubt they were put there to indicate the contents—that they were bottles of *Yorkshire* Relish. It appears to me, therefore, that the proof in fact of the user of these words as a trade-mark before 1875 breaks down. For these reasons I am of opinion that this mark ought to be removed and that this appeal must be dismissed.

BOWEN, L.J.:—

I am of the same opinion, and I take first the last question my Brother has treated, namely, the question whether there is evidence here to satisfy us that the term "*Yorkshire Relish*" has been used as a trade-mark before the 13th of August, 1875. The term "*Yorkshire Relish*" has been impressed on packing-cases on the outside of the four sides. Is that user a user as a trade-mark of the term "*Yorkshire Relish*"? It seems to me the answer is to be given by the simplest consideration of what is really the function of a trade-mark. The function of a trade-mark is to

C. A.
1893
In re POWELL'S TRADE-MARK.
Bowen, L.J.

give an indication to the purchaser or possible purchaser as to the manufacture or quality of the goods—to give an indication to his eye of the trade source from which the goods come, or the trade hands through which they pass on their way to the market. It tells the person who is about to buy, or considering whether he shall buy, that what is presented to him is either what he has known before under the similar name, as coming from a source with which he is acquainted, or that it is what he has heard of before as coming from that similar source. It is obvious that if it is to be an indication to the purchaser's eye of what I have stated, it must either be impressed on the goods or so accompany the goods as to produce that effect upon the purchaser. Accordingly it may be either marked on the goods themselves, or, if that is not possible or convenient, it may be marked on the vehicle of the goods, and may be, and sometimes, I dare say, is, marked upon a covering or exterior, such as a packing-case. But when you are considering a mark upon the vehicle as distinct from a mark upon the goods, you must ask yourself carefully, Is this mark used as a trade-mark? Is its object and use to indicate to the purchaser what I have suggested? The alternative view of a mark placed outside a packing-case may be that its object is not to indicate anything at all to the purchaser, but to indicate something to those who are handling the packing-case either for the purpose of carriage or storage; or it may be to indicate not that the goods are the goods of a particular firm's manufacture, but to indicate the name of the thing inside—to shew what is inside the box. We have in this case to decide between those two contentions. On the one side it is suggested by the counsel for the Appellant that this use of the term "*Yorkshire Relish*" upon the packing-case was a use as a trade-mark, intended to indicate to the purchaser the true trade source from which the goods came; and on the other it is suggested that the mark was merely a mark on the packing-case to shew what was inside, for the purposes of convenience of those who might want to know what was inside the case, just as you might have a packing-case which had inside it wine, or a packing-case which had inside it champagne, on the outside of which was "Wine," or "Champagne." Which of these views is the true

view? It seems to me, though it is perfectly possible that a mark on a packing-case may be intended to be used as a trade-mark, it can only, as a rule, be so when the packing-case is intended to sell the goods, and the packing-case is intended to be the thing shewn to the purchaser. I feel very great doubt indeed myself as to whether it would be reasonable to come to the conclusion in such a case as this that the packing-cases were intended to be used in that way for the sale of the goods, and I am not at all persuaded by the ingenious arguments of Sir *Horace Davey* and Mr. *Aston* that these packing-cases were intended to sell the goods in the wholesale trade, whereas the marks on the bottles were intended to sell the goods in the retail trade. I see no justification for that view in the evidence in the case. But certainly we are not going to lay down as a matter of law—indeed, it would be impossible to lay down as a matter of law without a universal knowledge of trade, both all trades present and all trades to come—that there may not be trades, and may not be conditions of particular trades, in which marks on packing-cases may be used as trade-marks. So far as the evidence goes, I very much doubt whether this was one of that class of cases.

The matter is placed beyond controversy as soon as we learn the history of this case. The term "*Yorkshire Relish*" no doubt does indicate an article which, as far as I know, was only manufactured by the firm of Messrs. *Goodall, Backhouse & Co.*, which the Appellant represents. They used a different mark on the bottle, and I must say that it is to the bottles, in the case of a sauce, that I should particularly look to find a trade-mark. Though I do not say as a matter of law it must be so, as a matter of business I should have expected to find it, if anywhere, on the bottle. Yet, they use on the bottle a different mark altogether, and have used this different mark on the bottle as long as they have used the term "*Yorkshire Relish*" on the cases, and in 1876, when they proceeded to register, having the power at law, if "*Yorkshire Relish*" really was a trade-mark of theirs at that time, to register "*Yorkshire Relish*" as a trade-mark, they do not register "*Yorkshire Relish*" as a trade-mark at all, but they register this other mark, and on

C. A.
1893
In re POWELL'S TRADE-MARK.
Bowen, L.J.

the outside of their bottle is this device, the *Willow Pattern Plate*, "*Yorkshire Relish*," "*Trade Mark registered Willow Pattern Plate*." So that they indicate to the world that the trade-mark is not "*Yorkshire Relish*," but the *Willow Pattern Plate*. It is not a question of estoppel at all. Do not let it be supposed for a moment I am putting it on estoppel; but when we find that in 1876 they state to the world that their trade-mark is the *Willow Pattern Plate*, and do not register at the same time "*Yorkshire Relish*," I think we may be pretty certain that the conclusion of fact at which we have arrived is the correct one, namely, that the use of this term stamped on the packing-cases was not a user of a trade-mark at all. The explanation of it is the simple one: that it was put on the packing-case to shew what was inside the packing-case. On those grounds, which are really the grounds of Mr. Justice *Chitty's* judgment—to which, indeed, it is very difficult to add anything because it is extremely clear and lucid—it appears to me that this appeal must so far fail.

But then there is the other point made by the Appellant, that the Respondents to this appeal are not persons who are aggrieved. Persons who are aggrieved are persons who are in some way or other substantially interested in having the mark removed from the register, or persons who would be substantially damaged if the mark remained. It is very difficult to frame a nearer definition than that. In the *Apollinaris Case* (1), it was pointed out, not as a complete or exhaustive definition, that people would be aggrieved if they were in the same trade and dealt in the same article. To my mind, it is equally true that persons would be aggrieved if they are in the same trade, and might reasonably be expected to deal in the same article, though not prepared to prove at the moment that they had formed a clear determination to do so. Supposing that this mark ought not to be on the register, it hampers those who are in the trade and who might wish to consider the question of embarking in another branch of the trade if lawfully entitled to do so. It would be, to my mind, an unbusinesslike construction to place on the term "aggrieved," to say that it could only be applicable

(1) [1891] 2 Ch. 186.

to those who actually had formed a fixed and crystallized intention of dealing in the particular article if permitted to do so. If a man is hampered in his arrangements of business matters in the future by the fact that a trade-mark is on the register which ought not to be there, he is a person who, to my mind, is sufficiently aggrieved to come within the section. In this particular case it is perfectly true that "*Yorkshire Relish*" denotes the article which is made by, and has been made for many years by, the Appellant's firm, and it looks extremely unlikely that any person, even the Respondents, could now use the term "*Yorkshire Relish*" without running great risks. But if "*Yorkshire Relish*" is not a term to which the Appellant has the exclusive right, it is conceivable that the Respondents or any other persons in the trade might by an honest and strong endeavour, carried out effectually, so distinguish the sale of the article which they are selling from the sales of the Appellant's sauce, or so distinguish the manufacture of the article which they manufacture from the manufacture of the Appellant's sauce, as to prevent the possibility of the outside customer being deceived. It is impossible for a Court of Law to say that it might not be done, and if it can be done, the trade have a right to have that door left open to them. On this ground it seems to me that, though *Yorkshire* Relish be an article which up to this time has been made by the Appellant, and which up to this time has been identified with his manufacture, nevertheless, unless this trade-mark is rightly upon the register, it cannot be said that the Respondents are not interested in having it taken off. It is admitted that if an action were brought against them for infringing this trade-mark they then would be persons aggrieved, and would then have a right to move to take it off. Look at the absurdity to which that would lead, upon the contention of the Appellant. We should say to people in the trade who are prevented by this trade-mark from using it as theirs, "If an action is brought against you, you then will be sufficiently aggrieved to remove this from the register; but as long as they do not bring an action against you, it may lawfully stay on the register so as to terrify you." That is impossible. The true view, to my mind, is, that we must look to see not merely, as in the *Apollinaris Case* (1), whether people are

(1) [1891] 2 Ch. 186.

C. A.
1893
In re POWELL'S TRADE-MARK.
Bowen, L.J.

in the same trade and actually intending to carry on the business; but whether in the reasonable scope of the conduct of their affairs it is reasonably possible that they may want to carry it on, excluding remote possibilities and attaching oneself to real and substantial business chances. I had formed an opinion, even before I heard Mr. *Thompson* in the box, that sauce manufacturers manufacturing relishes of the kind which the Respondents are manufacturing would be sufficiently within the area of grievance to become persons "aggrieved"; and on hearing the evidence of the gentleman who gave his evidence in the box, and gave it, to my mind, extremely carefully, I was more than ever satisfied that if this is taken off the register some attempt may be made—a risky attempt, perhaps—but some attempt may be made, which can honestly be made, to manufacture *Yorkshire* Relish, distinguishing the manufacture from that of the Appellant. In this case it seems to me the appeal fails, and ought to fail, with the usual result.

KAY, L.J.:—

I am of the same opinion on both points. There are two reasons suggested by the owner of this trade-mark against this application to expunge the words "*Yorkshire Relish*" from the register; one being that the Applicants were not persons aggrieved within the meaning of the 90th section, and the other that the trade-mark is properly on the register. The first of those two objections, of course, implies, that even if the mark is wrongly on the register, these people are not people who have a right to apply to have it taken off, and one must assume, to try that question, that the mark has wrongly been put upon the register. One enormous difficulty in the way of the argument, as it struck my mind all through, is this, that if these persons are not persons aggrieved, it is extremely difficult to suggest that at this moment there are any persons who would be aggrieved by this mark being wrongly on the register. Consequently, it seems to follow from the argument which has been used before us, that although the mark is wrongly put upon the register, there is no one at this moment who can apply to have it taken off. If that is the consequence, it makes one examine the argument a little closely. But when

we come to look at it it comes to this: the Applicants in this case are persons who are manufacturers, amongst other things, of sauces. For anything I know, and for anything which can possibly be determined in this case, they may have the right to use in some form or other the words "*Yorkshire Relish*" as a designation of sauces made by them. It is impossible to determine in this case that, apart from the registration, if there was no such registration as that complained of, they would not have such a right. That may hereafter arise in a litigation between the parties in order to determine that very question, and, as at present advised, it seems to me quite impossible to come to any definite opinion upon that subject. But the argument has been, upon the evidence now before the Court, that these words "*Yorkshire Relish*" could not, in any kind of way, be used by the Applicants as a description of any sauce made by them—could not be legally used; and if they were, we should be able to obtain an injunction to restrain their use, and, therefore, because they could not use these words they cannot be persons aggrieved by our putting this upon the register. That argument has been answered by what Lord Justice *Fry* said in the *Apollinaris Case* (1). What he said in effect was this: If you are actually suing the persons who are applying to have this mark taken off the register, you might sue them on two grounds: you might sue them, first, because they were infringing your registered trade-mark, and as to that you would have only to prove that your trade-mark was registered, and if there was no application to take it off, you would succeed at once if you shewed that the use they were making was of any substantial part of your trade-mark: and you might sue them in the same action, if you liked, for using words calculated to pass off their goods as being the goods of the plaintiff in the action. That is a right entirely independent of the right to a trade-mark. Lord Justice *Fry* says, if you were actually suing, the man who is being sued has a right to say, "That is not a proper trade-mark," and has a right to defend himself by applying to have the trade-mark expunged as being improperly on the register. I agree, that his language is confined to the case of an actual pending action for that purpose. If

(1) [1891] 2 Ch. 228.

C. A.
1893
In re POWELL'S TRADE-MARK.
Kay, L.J.

an action were brought against a person who was using the trade-mark for an injunction to prevent an infringement of that trade-mark, that person is a person aggrieved; but I entirely deny that the case is confined to that. If he be a person engaged in the same trade, who in the development of his trade hereafter may find it necessary or expedient to use these words, or who might be able to use them, either alone or in conjunction with some other words, if it were not that there was this trade-mark on the register; then, to my mind, he is a person aggrieved, by having this trade-mark on the register, which prevents his using those words in any kind of way. Therefore, I think these persons, being persons in the same trade, as to whom I am not at all satisfied it may not be expedient, in the development of their trade, hereafter to use the words "*Yorkshire Relish*," either alone or in conjunction with some other words, and not being at all satisfied that they may not, for anything that appears to the contrary in this case, have some right to do that if these words were not registered, are persons who are aggrieved by the fact of this trade-mark being on the register, if it is improperly there.

Then as to the question of these words being improperly there. I should say I agree entirely with what Lord Justice *Fry* said in the *Monopole Case, Richards* v. *Butcher* (1). You would not expect to find the trade-mark of goods like a sauce, which is sold in bottles with labels on the bottles, on the case containing numbers of those bottles which are sent out to retail dealers. They are sent out wholesale to retail dealers packed in those cases. You would not expect it to be the case on which the trade-mark would be put; but what to my mind is quite conclusive is this—there was no doubt on each of the four sides of the cases so sent out the words "*Yorkshire Relish*," and practically nothing else. The words were there alone; but in 1876 the firm who made this *Yorkshire* Relish, and sent it out in such cases, did register a trade-mark. Mr. *Aston* suggested that at that time they could not have registered these words; but afterwards, when Mr. *Moulton* pointed out the nature of the Act which was then the operative Act in respect of registration, Mr. *Aston* withdrew that; and it is quite plain, if they had been

(1) [1891] 2 Ch. 522.

so minded, if they could ever have registered the words, they might have registered them in 1876, when they registered another and different trade-mark. They registered in 1876 a trade-mark which they represented they had been using from about the year 1864, but they did not then register the words "*Yorkshire Relish*," either as part of that trade-mark, or as a separate trade-mark. They waited until 1884, and in 1884 they registered the words "*Yorkshire Relish*" as a trade-mark which they had been using contemporaneously, namely, from 1864. Now, if they themselves understood that the use that they had made of the words "*Yorkshire Relish*" from 1864 to 1876 was a use of a trade-mark, why in the world did they not register it when they registered their other trade-mark? I have had no answer to that question satisfactory to my mind at all, and I do not put it as a mere question of the intention of the people who were registering, but as a very plain demonstration of that which they understood to be the fact, namely, that at that time they never had used the words "*Yorkshire Relish*" as a trade-mark. I do not think that any evidence that could be given could be more satisfactory than the act which they themselves did in 1876 to shew that they thoroughly understood that the use they had made of those words "*Yorkshire Relish*" was not the use of a trade-mark.

Now, look at what they actually did. From 1876, at any rate, and I suppose from 1864, they put into these cases bottles containing *Yorkshire* Relish, and upon those bottles they put that which was their real trade-mark, and from 1876, at any rate, they were so careful to define what their trade-mark was, that, not satisfied with putting the willow-pattern plate, which was the thing they had registered, upon the labels on their bottles in two different places, they put by the side of it the words "*Trade Mark*," so that what they themselves say is this: "Now, mind, our trade-mark is not this label; our trade-mark is nothing on the case; our trade-mark is the *Willow Pattern Plate*." People who do that, who send the whole thing out together, the case and the bottles in the case, can hardly expect to have full credit given to the statements which they choose to make many years afterwards, when they have attempted to register the words "*Yorkshire Relish*"—"Oh, but '*Yorkshire Relish*' was our trade-

C. A.
1893
In re POWELL'S TRADE-MARK.
Kay, L.J.

mark, and we used it as a trade-mark from the year 1864," and yet that is what they come to say now, and they support that by the evidence of Mr. *Powell*, which has been read, and by the evidence of certain of their customers who have been accustomed to buy these cases from them, and who all say that the use on the case was a use of a trade-mark. I confess that evidence produces the very slightest possible effect on my mind. I think the materials on which the Court has to judge, whether the use of particular words like these was the use of a trade-mark or not, is the manner in which the use has been made, and when we find that most carefully on the bottles in those cases the persons who now claim this trade-mark have always distinguished that which was their real trade-mark, it is almost as emphatic as if they had said: "Now, mind, nothing upon these cases, or in these cases, or upon these bottles, is our trade-mark except this, *Willow Pattern Plate.*" I think that any intelligent tradesman receiving a case of that kind, opening and examining the bottles, would thoroughly understand that the words used on the outside of the case were not used as a trade-mark, but were simply used to indicate that these cases contained *Yorkshire* Relish. Suppose these words had been outside the case, "This case contains *Yorkshire* Relish," could anybody in his senses say that those words would be a trade-mark? In my opinion that is the only meaning of the words outside of the case. If I had any doubt about it the doubt would be entirely removed by what I find on the bottles inside the cases, and by the course which the Appellant's firm in this case took when they registered the trade-mark, which they did register in 1876. I agree entirely with Mr. Justice *Chitty's* judgment, and think that this appeal should be dismissed with costs.

Solicitors for Applicants: *Cooper, Thorowgood, & Tabor*, agents for *Cooper & Co., Newcastle.*

Solicitor for *W. Powell*: *J. Seymour Salaman.*

Solicitor for Comptroller: *Solicitor to Board of Trade.*

M. W.

In re FISH.
BENNETT *v.* BENNETT.

[1891 F. 76.]

C. A.
1893
WRIGHT, J.
Feb. 10.
C. A.
April 25, 26, 27.

Solicitor Trustee—Power to Charge for Professional Services and Trouble—Settlement of Accounts between Trustees.

A testator appointed *B.* and *G.* his executors and trustees, bequeathed to *G.* if he should accept the offices of trustee and executor £200, and declared that *G.* and every future trustee of his will who might be a solicitor, should be entitled to receive out of the estate his usual professional costs and charges for business transacted by him, including business not strictly professional, but which might or would have been performed in person by a trustee not being a solicitor. Considerable sums were charged by *G.* against the estate for business done by him, including charges for his trouble in matters not strictly professional:—

Held, that *G.*, although a legacy was given to him in his capacity of trustee, was entitled under the above clause to charge for his trouble as well as to make professional charges for business done by him as solicitor:—

Held, also (reversing the judgment of *Wright*, J.), that in the absence of special powers in the will, trustees cannot settle the amount payable out of the estate to one of themselves, so as to bind the *cestuis que trust*, and that the residuary legatees were entitled to have *G.'s* costs and charges investigated.

P. T. FISH, by will dated the 19th of February, 1885, appointed his nephew, *Samuel Bennett*, and his solicitor, *Herbert Clifford Gosnell*, executors and trustees, and bequeathed to *Gosnell*, if he should accept the offices of trustee and executor, the sum of £200. "And I declare that the said *H. C. Gosnell*, and every other person to be hereafter appointed a trustee of my will who may be a solicitor and professionally employed in matters relating to the trusts of my will, shall be entitled, and is hereby authorized to retain and receive out of the trust premises, his usual professional costs and charges, as well by way of remuneration for business transacted by him or his partner or partners personally, or by his or their clerks or agents (including all business of whatever kind not strictly professional, but which might have been performed, or would necessarily have been performed in person by a trustee not being a solicitor), as costs

C. A.
1893
In re FISH.
BENNETT *v.* BENNETT.

and charges out of pocket in the same manner as if the said *H. C. Gosnell*, and every other such person as aforesaid, had not been a trustee or trustees hereof, but had been employed and retained by the trustees hereof as solicitor in the matter of the trusts." The testator gave his real and personal estate to his trustees upon trust to sell and convert the same, pay his debts, funeral and testamentary expenses and legacies, and invest the residue, and pay the income to his said nephew, *Samuel Bennett*, for life, then to *Samuel Bennett's* wife for life, and then to hold the fund upon trust for such children and issue as therein mentioned of *Samuel Bennett.*

On the 10th of February, 1886, the testator entered into articles of partnership with *Alfred Ernest Gosnell* (a brother of *H. C. Gosnell*), for manufacturing and selling trousers-stretchers and other articles under the firm of *Hamilton & Co.* The partnership was to continue for five years from the first of January, 1886. The testator brought in £3750, *Alfred Gosnell* £312, and the testator agreed to bring in, as and when required for carrying on and developing the business, further sums up to £3000. *Gosnell* was to receive a salary as managing partner, and subject to provisions as to payment of interest on the capital, the profits were to be divided equally. Losses were also to be borne equally. If the testator died during the partnership term, his capital was to remain in the concern till the end of that term.

On the 1st of March, 1886, the testator made a codicil to his will, by which he gave his trustees the widest possible powers with reference to the partnership business, authorizing them to make such arrangements as might seem to them desirable for carrying into effect the provisions of the partnership deed, with liberty to determine in such manner as might be advised by counsel or otherwise any question which might arise as to the construction of the deed or otherwise in relation thereto. He empowered them to vary the provisions of the deed as they and *Alfred Gosnell* might agree, and to continue the business for such time as they might think fit, either in partnership with *Alfred Gosnell* or with the person or persons who might be in the partnership at the testator's decease or alone, and to employ in the business the capital employed therein at his decease, and also

such further part (if any) of his estate and effects as to his trustees should seem proper. He also gave the trustees ample discretionary powers as to winding up the business, so far as regarded his estate, either immediately after his decease or at such other times as they should think fit, and he declared that they generally should have the fullest powers and discretions as to winding up the business as if they were the absolute owners.

The business was carried on unsuccessfully, and the testator brought in further sums amounting to £7180, making his aggregate capital £10,930.

The testator died on the 1st of November, 1888, and his will was proved by both executors.

At the end of May, 1889, the trustees arranged with *Alfred Gosnell* that he should make over to them all his interest in the business, and should be employed by them as manager at a salary. An account was made out, by which it appeared that £5466 5*s.* 4*d.* was due from *Alfred Gosnell* to the testator's estate.

In July, 1889, *Percy Frederick Bennett* was appointed a trustee of the will in place of *Samuel Bennett.*

In September, 1889, the trustees made over to *Alfred Gosnell* the business and its assets in consideration of £600, and released him from all liabilities except as to the £5466 5*s.* 4*d.* There was now no probability of recovering any substantial part of this sum, and the result was that the continuance of the business after the testator's death had caused a considerable loss to his estate.

On the 16th of January, 1891, the wife and children of *Samuel Bennett,* except *Percy F. Bennett,* commenced this action against *Herbert C. Gosnell* and *Percy F. Bennett,* alleging that the business had been continued after the death of the testator with a view to the interest of *Alfred Gosnell,* without regard to that of the testator's estate, and that the affairs had been under the sole control of *Herbert Gosnell,* as *Samuel Bennett* was in ill-health and incapable of attending to business, and signed anything that *Herbert Gosnell* put before him. The statement of claim further alleged that *Herbert Gosnell* had retained out of the estate large sums of money in respect of what he alleged

C. A.
1893
In re Fish.
Bennett v. Bennett.

to have become due to him for costs in respect of business transacted by him for the testator in his lifetime, and in the administration of his estate since his death, and had never delivered any bills of such costs, and declined to do so on the ground that the same had been paid, and that his co-trustees had respectively agreed and settled in account with him the amounts of such bills without requiring delivery thereof. The Plaintiffs claimed administration of the estate, the appointment of new trustees and of a receiver, delivery and taxation of all *Herbert C. Gosnell's* bills of costs paid since the testator's death or remaining unpaid, payment by him of what on taxation he should be found to have received in excess, and a declaration that he was liable to make good to the testator's estate the loss incurred by the continuance of the business after the death of the testator.

The costs of *Gosnell* which had been paid him were so paid by cheques drawn by both trustees in favour of *Gosnell*, and they were not paid until they had been investigated by the other trustee.

The action was tried by Mr. Justice *Wright* on the 10th of February, 1893. His Lordship came to the conclusion that what the trustees had done as to the business came within the discretionary powers given, and that on the evidence they had exercised those powers with good faith and discretion, taking the best professional advice, and that there was no foundation whatever for the suggestion that they had acted with a view to the interests of *Alfred Gosnell*, and that the attempt to make Mr. *Herbert Gosnell* liable for the loss completely failed. His Lordship then proceeded as follows:—

"The other part of the case relates to Mr. *Herbert Gosnell's* bills of costs. These arise out of a very wide power given by the will, which authorizes him not only to charge the usual professional costs, but to make professional charges for all business though not professional. I agree with Mr. *Crackanthorpe* that there is here no right to taxation properly so called, for the reason that the beneficiaries are not the clients of Mr. *Gosnell*. Is there then a right to a moderation of these charges, or to an account to be given by him as trustee of the disburse-

ments which he and his co-trustee have made to himself for his claims under the clause of the will, which allowed him to charge for his trouble? I express no opinion how the case would have stood if there had been no settled account of any sort, or if any breach of trust were alleged and proved. Here, I think on the evidence, that there were settled accounts, and no case apart from the matter of costs is made out by the beneficiaries. I am satisfied that these bills of costs were gone into in substance and sufficiently in detail by Mr. *Gosnell's* cashier and the other trustee.

"Then arose the question whether, as against the beneficiaries, the settlement of the account by the Defendant *Gosnell* and his co-trustee was enough. I speak with great diffidence upon a point of this kind, upon which no authority was cited by either side, but I agree with Mr. *Crackanthorpe's* argument that, *quâ* this matter, the Defendant *Gosnell* was in the position of a stranger to the trustees, and therefore *quâ* this matter a settlement by him with the trustees must I think be enough. If a stranger's settlement with the trustees could be reopened by the beneficiaries in the absence of some specific case made, I do not see how any one dealing with trustees could ever be safe. I take it to be the law that if a stranger has a settled account with the trustees, it cannot be reopened by the beneficiaries in the absence of fraud or some other affirmative case of that kind. In relation to this matter I think that the Defendant *Gosnell* is in the same position as if he were a stranger, and that a settlement come to in good faith binds the beneficiaries. I think that the case would be otherwise if the co-trustee had waived a proper statement of account, as in *Re Upperton* (1). Here there was no waiver of going into the accounts, and I think that they were fully settled as between the Defendant *Gosnell* and his co-trustee."

His Lordship accordingly held that the action had failed, and dismissed it with costs as between solicitor and client.

The Plaintiffs appealed. The appeal came on for hearing on the 25th of April, 1893.

C. A.

(1) 91 L. T. Jour. p. 431.

C. A.
1893
In re FISH.
BENNETT
v.
BENNETT.

The Respondent's counsel were not called upon as to the claim to make the trustee liable for the loss arising from continuing the business, and it is not thought needful to enter into that part of the case.

Fischer, Q.C., *A. Whitaker*, and *Lindon*, for the appeal:—

The testator gives Mr. *Gosnell* a legacy which is intended to compensate him for the trouble he will have as a trustee, and the power to charge for business is intended to compensate him for professional work only, the legacy being his compensation for work which is that of a trustee, and not of a solicitor. *Harbin* v. *Darby* (1) shews that a power to a solicitor trustee to charge for professional services does not entitle him to charge for what a trustee not a solicitor could do personally.

[KAY, L.J.:—Mr. *Wolstenholme's* form, from which the clause here is taken, was intended to avoid that decision. *In re Ames* (2) is against you.]

That case was distinguished and not followed in *In re Chapple* (3).

[KAY, L.J.:—There the direction was that the solicitor should make "the usual professional charges."]

But those words were followed by words as comprehensive as the words here. The words "professionally employed," in the present case, override the whole clause, and the whole power given to him is in terms to retain out of the estate "his usual professional costs and charges." Mr. *Gosnell's* charges, though not liable to strict taxation, are liable to be moderated: *Allen* v. *Jarvis* (4); *Re Upperton* (5).

Crackanthorpe, Q.C., and *Forman*, for the Respondent:—

We say that any accounts that are directed should be subject to a direction not to disturb settled accounts. The charges of Mr. *Gosnell* which have been paid ought to be treated as settled accounts. On each the items were gone into with the co-trustee, and the amounts were paid by cheques drawn by both. If two

(1) 28 Beav. 325.
(2) 25 Ch. D. 72.
(3) 27 Ch. D. 584.
(4) Law Rep. 4 Ch. 616.
(5) 91 L. T. Jour. p. 431.

trustees employed a solicitor, they clearly could settle his bill; and if one of them, being a solicitor, acts as such, his account can never be settled unless he and his co-trustee can settle it. The testator cannot have contemplated an application to tax on every occasion when there was a bill of costs to be paid. *In re Jackson* (1), following *In re Spencer* (2), is against granting any such relief as is here asked.

Fischer, in reply.

April 27. LINDLEY, L.J.:—

This is an appeal by the residuary legatees of a testator of the name of *Fish* against the judgment of Mr. Justice *Wright*, made on the trial of the action, and dismissing the action with costs.

The main object of this action, and, as I think, its only real object, was to charge the Defendants, we will say, but Mr. *Gosnell* more particularly, with a somewhat serious loss occasioned by continuing the business in which the testator had been a partner with Mr. *Gosnell's* brother, Mr. *Alfred Gosnell.* [His Lordship then, after shortly stating the facts, proceeded:—]

It was Mr. *Gosnell's* duty to exercise his judgment as to what was the best thing to be done. Notwithstanding all the attacks which have been made upon him, I am convinced that he did act to the best of his own judgment, after taking the advice of skilful accountants, and consulting his co-trustee, Mr. *Samuel Bennett*, from time to time. The attack against him personally altogether breaks down; and I come clearly and distinctly to the conclusion that what he did was within the terms of his trust, and was done *bonâ fide* for the benefit of the estate, and with due care and caution.

I pass on to another question, which is, as to the charges which he is entitled to make against the estate. Let us consider what the position was. Mr. *Fischer* has argued that, notwithstanding the clause in the will, Mr. *Gosnell* has no right to charge for his trouble as a trustee as distinct from his services as a solicitor. He said, "You have, indeed, in this will, Mr. *Wolstenholme's* form, which is carefully worded in order to enable the solicitor trustee

(1) 40 Ch. D. 495. (2) 30 W. R. 296.

C. A.
1893
In re FISH.
BENNETT v. BENNETT.
Lindley, L.J.

to charge for his trouble; but then you have a legacy to this gentleman of £200 in addition; and when you take that legacy and the form together, it is quite obvious that what the testator meant was that Mr. *Gosnell* should have £200 for his trouble in matters which were not solicitor's work, and that he should be at liberty to charge for his professional costs." But the will does not say that. Mr. *Gosnell* may have fairly enough said, "I will not accept the trusts of this will except upon the terms that I am to have my £200, and also payment for my trouble"; and when you come to look at the will, it is impossible to say that he is not justified in adopting that view, because the clause which enables the trustee to charge for his trouble, as well as for his professional costs as a solicitor, is not confined to Mr. *Gosnell* but applies to any trustee who is a solicitor. Therefore, it appears to me that the construction put by Mr. *Gosnell* and his advisers upon this will is the right one, and that he is entitled to charge, not only for his professional services, but for his trouble as a trustee, and also to have his legacy.

It would, perhaps, under ordinary circumstances have been undesirable for us to make such a statement as that at this stage of the proceedings. It might have been better if we had waited until the Plaintiffs had objected to some particular charge, and brought the matter up in some concrete form; but upon consideration we are satisfied that, as Mr. *Fischer* has raised the point, it may save litigation and expense if we dispose of it at once, and we dispose of it in the way I have said.

The next point to which I will refer is this. There is an application to remove Mr. *Gosnell* from the trusteeship. So far as we are in possession of the circumstances there is no ground whatever for his removal. I speak in that guarded way because it may be that his costs when investigated may have considerable influence upon the case. He is willing to retire, as he does not wish to continue trustee if nobody wants him; and as he is desirous of retiring, a trustee had better be appointed in his place as soon as the controversy is closed.

The last point is this: The Plaintiffs say, "We ought to have your accounts investigated." In this I think they are right; I think that Mr. Justice *Wright* has gone too far in dismissing

the action with costs. The Plaintiffs are perfectly justified in saying that the costs and charges have not been so settled between Mr. *Gosnell* and his co-trustee, Mr. *Samuel Bennett*, or his successor in the trusteeship, as to make those accounts binding on the *cestuis que trust*. I cannot think that, in the absence of special power given to them by the instrument creating the trust, two trustees can settle accounts between themselves, and then tell the *cestuis que trust*, "The accounts are settled, and you have nothing to do with them." I never heard of such a proposition before, and it would be an extremely dangerous one. Testators might, of course, put clauses into their wills to enable trustees to do it; but there is no such clause here, and in the absence of such a clause I cannot hold that any of these accounts have been settled so as to be binding npon the *cestuis que trust*. Therefore, they are entitled to have these accounts investigated, and I shall point out presently the right way of doing it. It is not, under the present General Order, incumbent upon the Court to make a decree for the administration of the estate, nor is such a decree needed for the protection of the *cestuis que trust*. What they want, and what I think they are entitled to have, is this: As I understand it, the solicitors for the Plaintiffs have got the books containing the accounts. They have also got, or if they have not got they ought to have, the day sheets which shew the particulars of Mr. *Gosnell's* charges for professional costs and trouble. The Plaintiffs are to be at liberty to examine them, and to make objections in writing to any of the items, and to make surcharges within a time to be limited. Any contested item ought to be brought before the Judge in Chambers, and he must be at liberty, of course, to refer any of the disputed items of the bills of costs to a Taxing Master. That, I think, will dispose of all the points which have been raised.

Now comes the question of costs. It appears to me that almost the whole of the costs of this litigation have been occasioned by the improper attack on Mr. *Gosnell* in respect to the losses sustained by carrying on the business, and in my opinion the right order will be to dismiss the action with costs, so far as it seeks relief against the Defendants or Mr. *Gosnell* in respect to

C. A.
1893
In re FISH.
BENNETT *v.* BENNETT.
Lindley, L.J.

loss sustained by continuing the business of *Hamilton & Co.*, and to reserve the remaining costs of the action, and the costs hereafter to be incurred, to the Judge to whom this action is attached. Then, as regards the costs of the appeal. The appeal, to my mind, in substance fails, and the Plaintiffs ought to pay the costs of it.

Mr. *Fischer* has urged us to give these costs out of the estate. We have considered that very carefully, and we think that it would be wrong to do it. One of the great benefits which have been achieved of late years is to discourage actions the costs of which under the old system were given far too freely out of the estate. Let next friends take care what they are about when they institute hostile actions in the names of infants. They ought not to be allowed to institute actions which fail except at their own risk, and not at the risk of the infants. In our opinion it would be wrong to let these costs come out of the estate; those who have incurred them ought to pay them.

BOWEN, L.J.:—

I am of the same opinion, and I shall add only a very few words, because the Lord Justice has expressed perfectly what, in my judgment, is the only view to which the Court could come upon the hearing of this case. The main object of the action—I trust, at all events, it was the main object— was to charge the Defendant *Gosnell* with the loss sustained by carrying on the business after the death of the testator, and in that respect the action has failed.

[His Lordship here expressed himself to the same effect as the Lord Justice *Lindley*, that what *Gosnell* had done was within the terms of his power, and had been done *bonâ fide* with a view to the good of the estate, and with due care and caution.]

The action, therefore, fails as regards its main object, and what remains seems to me to be matter which would not justify the bringing of this action. There seems to me to have been no refusal to give an account. Whether the accounts are satisfactory or not is another matter, and they will be investigated at the risk of the person who challenges them. I agree entirely in what my brother the Lord Justice has said as to the true interpretation of

the clause which provides for the remuneration of the trustee. I will not go over the ground again which he has gone over, for he has put effectively all that I could desire to say about this point. I will only add this for myself: that I do not consider, having regard to the main object of this action, that Mr. *Fischer's* client is entitled to any declaration upon this point at this stage of the cause; and it would, I think, in most cases be better to refrain from giving any exposition of the law as to the construction of such a particular clause until special items were brought before the Court upon which it could adjudicate. But I agree with the view of my learned brother that to negative Mr. *Fischer's* proposition can do no harm, and will save expense in the long run. I think, therefore, it must be taken that it is our view—which will govern the moderation of the accounts—that the trustee is entitled to such remuneration as the Lord Justice has said.

There is another matter which also has arisen, and upon which, therefore, we pronounce an opinion—whether Mr. *Gosnell's* costs and charges as a solicitor have been settled or paid in a way which prevents them from being now reopened. I emphatically protest against the notion that a payment by one trustee to himself out of moneys in his hands which he holds jointly with other trustees can be such a payment or settlement as precludes it being challenged afterwards by a *cestui que trust.* Two trustees draw a cheque in favour of one of them which is paid out of the trust fund, and it is contended that this is not only a settlement of account but a payment within sect. 41 of the *Solicitors Act.* It seems to me to be nothing of the kind. It seems to me at most a retainer, and it does not prevent the *cestuis que trust* from challenging afterwards the items in the bill or in the account. The opposite view would lead to mischief of the most serious character. If two trustees can by a payment made between themselves to one of them effect a payment within sect. 41 of the *Solicitors Act* or a settlement of account, it seems to me that time would run in favour of the trustees from an act done in private over which nobody has any control, and of which nobody except the trustees may have had any knowledge till long afterwards. The principle is clear that the payment by a man to himself,

C. A.
1893
In re FISH.
BENNETT *v.* BENNETT.
Bowen, L.J.

even if it is effected by a cheque signed by his brother trustee, out of funds of which he is a trustee, does not operate as a payment at all, and if he chooses to keep the money which he gets by such a cheque he does so by way of retainer and not of payment. I am more disturbed in my mind about the management of this trust than I can say by the fact that such a plea was ever put forward on behalf of Mr. *Gosnell*, and I think, therefore, it is exceedingly desirable that we should mould our order in the way which the Lord Justice has stated in order to reserve to ourselves or reserve to the Judge at Chambers the power of dealing with so much of the costs of the action as relates to a removal of the trustee, should it turn out upon investigation that there has been anything like serious overcharge or serious cause of complaint upon the taxation of these bills of costs and the settlement of these accounts.

KAY, L.J.:—

We have carefully considered this matter and consulted together about all the points which have been raised in it, and I should have had nothing to remark were it not that some of those points involve questions of very general importance on which I do not like to give a mere silent assent. I have very little indeed to say about the first part, as to which the action is dismissed. [His Lordship expressed the same opinion as the other Lords Justices as to the conduct of Mr. *Gosnell* in continuing the business.]

But there are in this case certain other points which also I think are of very general practical interest, and one is the very peculiar clause which is inserted in this will, apparently from the form suggested by Mr. *Wolstenholme* in his precedents, giving the solicitor trustee power not only to charge professional costs for professional business done by him as solicitor to the trust, which, of course, he could not charge without express power given to him, but giving him power also to charge for all business done by him in his character of trustee.

It has been contended that the power, notwithstanding its peculiar language, does not extend so far, but that Mr. *Gosnell* is only entitled to charge for such work as is properly solicitor's

work. I do not at all compliment the framer of the clause, for I admit that some of its language affords grounds for such a contention, but still, judging of it fairly, I do not think that contention well founded. I think that the meaning and intention of the clause is to give the solicitor trustee power not only to charge for work which is the proper work of a solicitor done for a client, but also to charge for work which he would be bound to do as trustee or which he might do as trustee, and which would not properly be solicitor's work, as though it were professional work. That, I think, is the meaning of the clause, and, therefore, I think that in making charges of that kind against the estate, assuming them to be fair and honest charges, Mr. *Herbert Gosnell* was not doing more than the testator empowered him to do.

But I wish to say on my own behalf that when a solicitor trustee himself prepares a document containing a clause of that kind in his own favour, he must not be surprised if, when the matter comes before the Court, the Court is inclined to watch very jealously indeed his conduct as solicitor and trustee under the clause. It appears to me absolutely impossible for him to maintain that he can escape having his costs investigated and having the charges he has made against this estate, part of the capital of which belongs to persons who are still infants, investigated, because, as he says, he rendered the accounts of these charges to his co-trustee and agreed with his co-trustee that they were to be settled, and therefore paid himself with the assent and concurrence of his co-trustee out of the estate. That would be an exception to a rule, which is a rule, as far as I know without exception, that *cestuis que trust* have an absolute right to investigate the accounts of their trustees. The trustees cannot deny that right and say, "Of course you have a right to investigate our accounts, but when we have agreed between ourselves that certain items in those accounts shall go into the pocket of one of ourselves, that agreement between ourselves prevents your having an account as to those items." I repudiate absolutely any notion of that kind. Such a payment or settlement cannot be binding upon the *cestuis que trust* so as to prevent their examining the accounts, and it would be a disastrous thing

C. A.
1893
In re FISH.
BENNETT v. BENNETT.
Kay, L.J.

indeed for *cestuis que trust* if it could. The argument is this. If those trustees had employed an independent solicitor and had settled his accounts with him and paid him, then the *cestuis que trust* would have been bound by that settlement. Subject to the 41st section of the *Solicitors Act*, which gives them a year after the payment in which to obtain taxation, that would be so. But what took place here is utterly unlike a payment to an independent solicitor. Who are the persons who, when the independent solicitor is paid, settle the account with him? All the trustees settle the accounts of the independent solicitor. But here did all the trustees settle the account with one of themselves in such a manner that the *cestuis que trust* cannot challenge it? No authority whatever has been produced for anything of the kind. I have never before heard such a thing seriously suggested, and, speaking for myself, I have the strongest possible feeling that no such alleged settlement of accounts can bar the absolute right of the *cestuis que trust* to have the accounts of the trustees, and each of them, investigated and challenged if they think it right.

The next point in the case is this. No account of this estate has been investigated at all. Even the trustees' account has not been investigated. Certain books which seem to contain a very full statement of accounts were produced just before or just after the action was brought, but they have never been investigated, nor have they been vouched. There has been no taking of the account in any way. I agree that it is most inexpedient to allow the accounts of an estate like this to be taken under a general administration order, and to throw the costs of such an investigation upon the capital of the estate. The new Orders, especially those passed after Lord *Esher's* committee sat, were intended to meet that very case, and we propose to deal with this as Lord Justice *Lindley* has pointed out under those Orders.

There are certain Orders to which I will call special attention, because they were put among the General Orders after the sitting of that committee to which I have referred. One is Order XXXIII., rule 4 A: "Upon the taking of any account the Court or a Judge may direct that the vouchers shall be produced at the office of the solicitor of the accounting party, or at any

other convenient place, and that only such items as may be contested or surcharged shall be brought before the Judge in Chambers." The object of that is apparent. It is to prevent the enormous expense and delay which are continually incurred by directing the general accounts to be taken in the Chambers of a Chancery Judge. The other Order under which we propose to act is Order LV., rule 10 A, which also was introduced into the General Orders after the sitting of Lord *Esher's* committee: "Upon an application for administration or execution of trusts by a creditor or beneficiary under a will, intestacy, or deed of trust, where no accounts or insufficient accounts have been rendered, the Court or a Judge may, in addition to the powers already existing, order that the application shall stand over for a certain time, and that the executors, administrators, or trustees in the meantime shall render to the applicant a proper statement of their accounts, with an intimation that if this is not done they may be made to pay the costs of the proceedings."

Therefore, what we propose to do, and in this I think the learned Judge in the Court below has not given to the Plaintiffs that to which they are absolutely entitled, is, as Lord Justice *Lindley* has pointed out, to treat the accounts which have now been brought to our notice as being a statement of account within that last rule which I read, and to give the parties at their own risk as to costs, as Lord Justice *Bowen* has said—and I beg strongly to emphasize it—the power, if they like to examine those accounts, to contest any items in them, including, of course, those pay sheets, or day sheets (whichever they are called), which shew the charges made by Mr. *Herbert Clifford Gosnell* against the estate, and also, if they think fit, entirely at their risk as to costs, to surcharge any item which may be omitted in the accounts, and then if the contested items are not arranged with the trustees, or if the surcharges are not arranged, liberty to bring any contested items before the Judge in Chambers, who is to be at liberty to refer any disputed items in the bills of costs to the Taxing Master to be taxed. And I beg to say that I understand that to mean that in those pay sheets of Mr. *Herbert Gosnell* every item which is contained in them, whether it be a charge for trustee's work, or a charge for

C. A.
1893
In re FISH.
BENNETT v. BENNETT.
Kay, L.J.

costs properly so called, is a charge which may, if contested, be moderated by the Chief Clerk, or by the Taxing Master before whom it goes. That, I think, will do justice to all parties, and I think that the question what should be done as to the costs of that part of the action which refers to the dismissal of Mr. *Herbert Gosnell* from the trusteeship may to some extent be influenced by what may turn out to be the result of this investigation of the accounts. If in the investigation of the accounts little or no change shall be made, then the Judge will have to consider how far the Plaintiffs' next friend and the adult Plaintiffs should pay the costs of that part of the action. If, on the other hand, considerable alteration is made, the Judge will have to consider whether the Defendants, or some of them, ought not to bear those costs or some part of them. All that we do not in any way prejudice. The costs of all the action are reserved, except that part which, as we have intimated, must be dismissed with costs.

Now, I hope that the parties may have the good sense to use the order which has been now made in the spirit in which it is made, which is, to preserve this estate as far as possible from any unnecessary expense. It will be their own fault if they make undue expense under this order, and should they do it I repeat, and as the Lord Justice has already intimated, they do it on either side at their own risk as to costs.

Solicitors: *John Westcott; H. Clifford Gosnell & Tiernay.*

H. C. J.

DIBB *v.* WALKER.

CHITTY, J.

1893

Feb. 23; *March* 7, 17.

[1891 D. 875.]

Statute of Limitations (3 & 4 *Will.* 4, c. 42), s. 5—*Mortgagor—Covenant for Payment—Settlement by Mortgagor of Equity of Redemption—Tenant for Life of Equity of Redemption—Payment of Interest by—Judicature Act,* 1873 (36 & 37 *Vict.* c. 66), s. 25, *sub-s.* 6.

The payment of interest by the tenant for life of an equity of redemption, under a settlement made by the owner of the equity of redemption, is sufficient to keep the right of action on the covenant of such owner alive within the meaning of 3 & 4 Will. 4, c. 42, s. 5.

The principles laid down in *Forsyth* v. *Bristowe* (1) and *Roddam* v. *Morley* (2) followed.

Sub-sect. 6 of sect. 25 of the *Judicature Act*, 1873 (36 & 37 Vict. c. 66), is retrospective.

THIS was an action commenced by the mortgagees of a certain estate called the *Blyth* estate against the surviving executor and trustee of the will of *Henry Walker* for a declaration that under certain covenants of the said *Henry Walker* the Defendant was liable to pay and make good to the Plaintiffs out of the estate of *Henry Walker* so much of the money due to the Plaintiffs under or by virtue of their security as the money arising from the sale of the hereditaments comprised in the security would be insufficient to satisfy.

In certain indentures of transfer of mortgages existing on the *Blyth* estate dated the 22nd of January, 1831, to which the said *Henry Walker*, as the owner of the equity of redemption in the *Blyth* estate, was a party, were contained certain covenants on the part of the said *Henry Walker*, whereby he covenanted with the transferee, his executors, administrators, or assigns, that he, his heirs, executors, administrators, or assigns, would pay to the transferee, his executors, administrators, or assigns, the mortgage debt and interest.

By an indenture dated the 17th of August, 1833, and made between the said *Henry Walker* of the first part, *Henry Frederick Walker* (the eldest son of the said *Henry Walker*) of the second

(1) 8 Ex. 716. (2) 1 De G. & J. 1.

CHITTY, J.
1893
DIBB
v.
WALKER.

part, *Ellen Walker* of the third part, and trustees of the fourth part (being a settlement made on the marriage of the said *H. F. Walker* and *Ellen Walker*), *Henry Walker* conveyed the *Blyth* estate (subject to the mortgage securities) to the use of the said *H. F. Walker* for life, with remainder to the use of *Ellen Walker* for life, with remainders over. The settlement contained special provisions to the effect that if the covenantor and settlor were required to pay the mortgage debts and interest thereon, the trustees of the settlement would at his request sell the lands and apply the proceeds in payment of the debts.

Henry Walker, by his will dated the 8th of May, 1858, appointed the Defendant and two other persons, one of whom disclaimed and the other afterwards died, executors and trustees, and devised to them his real and personal estate upon trust for sale and conversion, and to pay his debts, and to pay the surplus to the Defendant.

Henry Walker died on the 19th of January, 1860, and *H. F. Walker* died on the 11th of November, 1866.

By an indenture dated the 9th of August, 1870, the mortgage debts and the securities, including the benefit of the covenants, were transferred to *C. J. Dibb* and others, under whom the Plaintiffs derived title by assignment. *Ellen Walker*, who was then tenant for life under the settlement, was a party to the deed, and the Defendant was also a party, though not expressed to be made so in his character of executor of *Henry Walker*. By way of further security, *Ellen Walker* by this deed entered into a covenant with the transferees for payment of interest to accrue due on the mortgage debts during her lifetime, and on the half-yearly day next after her death.

Such interest was paid by *Ellen Walker* until her death in February, 1889.

The *Blyth* estate was afterwards sold under an order of the Court made in an action instituted by the Plaintiffs as mortgagees to enforce their security, but did not realize sufficient to satisfy the mortgage debts.

The Plaintiffs thereupon commenced this action, claiming to have the assets of *Henry Walker* applied in satisfying the deficiency.

The Defendant set up the *Statute of Limitations* as a bar to the claim.

Before the action was commenced, but after the passing of the *Judicature Act*, 1873, the Plaintiffs gave express notice in writing to the Defendant of the assignment of the mortgage debt as required by the 6th sub-section of the 25th section of that Act.

Levett, Q.C., and *Borthwick*, for the Plaintiffs:—

The payment of interest by *Ellen Walker*, the tenant for life, was an acknowledgment "by the party liable," within the meaning of the 5th section of 3 & 4 Will. 4, c. 42, and as such sufficient to keep the right of action alive: *Roddam* v. *Morley* (1); *Forsyth* v. *Bristowe* (2).

Payment by a devisee for life of interest on a simple contract debt of his testator's is a sufficient acknowledgment under the statute to keep the right of action alive against all parties interested in remainder: *In re Hollingshead* (3).

The payment of interest by a mortgagor prevents the statute from running in favour of a surety: *In re Frisby* (4).

We submit that under the covenant of *Henry Walker* contained in the deed of the 22nd of January, 1831, his estate is now liable to pay the balance of the mortgage debts.

Byrne, Q.C., and *W. B. Coltman*, for the Defendant:—

Ellen Walker was tenant for life under the settlement; she was not an assignee nor liable under the original covenant; there was no obligation upon her to pay the interest, and there was no necessity for her to enter into the covenant.

To take the case out of the statute the payment must be an acknowledgment by the person making the payment of his liability: *Harlock* v. *Ashberry* (5); *Newbould* v. *Smith* (6).

Acknowledgment by one devisee does not prevent his co-devisee from pleading the statute: *Dickenson* v. *Teasdale* (7); *Bolding* v. *Lane* (8); *Coope* v. *Cresswell* (9); *Fordham* v. *Wallis* (10).

(1) 1 De G. & J. 1.
(2) 8 Ex. 716.
(3) 37 Ch. D. 651.
(4) 43 Ch. D. 106.
(5) 19 Ch. D. 539.
(6) 33 Ch. D. 127.
(7) 1 D. J. & S. 52.
(8) Ibid. 122.
(9) Law Rep. 2 Ch. 112.
(10) 10 Hare, 217.

CHITTY, J.
1893
DIBB
v.
WALKER.

We submit that as the assignment was made before the passing of the *Judicature Act*, 1873, the 6th sub-section of sect. 25 of that Act does not apply, as that sub-section is not retrospective. The representatives of the covenantees ought to be before the Court.

Levett, in reply, referred to *Chinnery* v. *Evans* (1), and *Pears* v. *Laing* (2), and further submitted that the 6th sub-section of sect. 25 of the *Judicature Act* was retrospective.

CHITTY, J.:—

The action is brought on covenants entered into by *Henry Walker* in 1831. The Plaintiffs are the absolute assigns of the debts covenanted to be paid and of the benefit of the covenants. The Defendant is the surviving executor and trustee of the will of the covenantor. The object of the action is to recover payment of the balance owing on account of the debts out of the assets of the covenantor retained by the Defendant for his own use as a beneficiary under the will. The Defendant does not admit assets; and if the Plaintiffs succeed it will be necessary to make such order for taking the accounts and administering the real and personal estate of the covenantee as will be appropriate to the circumstances of the case. Before commencing the action, and after the *Judicature Act* of 1873 came into operation, the Plaintiffs gave the notice in writing required by the 6th sub-section of the 25th section of that Act. In these circumstances it is objected for the Defendant that the sub-section does not apply, the point raised being that the assignment was made before the passing of the Act, and that the sub-section is not retrospective. In my opinion the objection must be overruled. The words "shall be deemed to have been effectual," which are found in the sub-section, are, I think, plainly retrospective so as to apply to a debt assigned before the passing of the Act. The 25th section, as shewn by the preamble, was passed for the purpose of amending and declaring the law to be "hereafter administered in *England*" as to the matters mentioned in the section. No just reason can be adduced for confining the operation of the sub-section to

(1) 11 H. L. C. 115. (2) Law Rep. 12 Eq. 41.

assignments made after the passing of the Act. The 3rd sub-section as to a tenant for life without impeachment of waste appears plainly to be retrospective. The sub-section in question deals rather with a matter of procedure than a matter of right. But even if I had thought that the objection could have been sustained I should have given leave to amend by making the representatives of the covenantees parties either as co-plaintiffs or defendants. Before the *Judicature Acts* the Plaintiffs could have maintained such a suit in equity as the present, making the legal personal representatives of the covenantees parties if the Defendant had required them to be joined. No suggestion is made that such representatives are threatening to sue or claiming any right. The objection is purely formal.

The question of substance in the action relates to the *Statutes of Limitation.* The only statute relied on by Defendant's counsel is the 3 & 4 Will. 4, c. 42, and the argument turned solely on the 3rd and 5th sections of that statute. A short statement of the facts extracted from the numerous and voluminous deeds and the admissions will suffice.

The covenants sued on are contained in two mortgage deeds dated the 22nd of January, 1831. Subsequently, on the marriage of his eldest son in 1833, the covenantor, *Henry Walker*, settled the mortgaged lands. By this settlement the lands were conveyed to uses subject to the payment of the mortgage debts, and special provisions were made to the effect that if the covenantor and settlor were required to pay the mortgage debts or the interest thereon, the trustees of the settlement should at his request sell the lands, and apply the proceeds in payment of the debts. The mortgaged lands were therefore, as between *Henry Walker* on the one hand and the persons claiming beneficially the equity of redemption under the settlement on the other, the primary fund for payment of the debts and interest. In 1870, the debts and the securities, including the benefit of the covenants, were transferred to *Christopher Jenkins Dibb* and others, from whom the Plaintiffs derive title by assignment. At this time Mrs. *Ellen Walker* was tenant for life under the settlement, and she was party to the deed of transfer. *Henry Walker* was then dead, and the Defendant was also party,

CHITTY, J.
1893
DIBB
v.
WALKER.

though he was not expressed to be made party in his character of an executor of *Henry Walker*. By way of further security, Mrs. *Ellen Walker* entered into a covenant with the transferees for payment of interest on the debts to accrue during her lifetime, and the half-yearly day next after her death. The days for payment of interest are not the same as those in the covenants transferred; but it was admitted by the Defendant's counsel that nothing turned on this slight difference. The formal admissions entered into for the trial are, that from November, 1866, to the 9th of February, 1889, *Ellen Walker* was tenant for life in possession of the mortgaged estate and paid the interest on the mortgage debts.

The estate has recently been sold in a suit instituted by the Plaintiffs as mortgagees to enforce their security. The estate, which, as may be inferred, was formerly of ample value to secure the mortgage debts, produced on the sale, by reason of the depreciation in the value of land, only £70,000, leaving a large deficiency, amounting, as was stated at the Bar, to about £30,000. To recover this deficiency, the present action was instituted in May, 1891.

It is obvious that, if the payment of interest by *Ellen Walker* was effectual to keep the right of action alive as against the assets of the covenantor, the statute relied on constitutes no bar to the action. Two points were made for the Defendant: the first was special, turning on *Ellen Walker's* covenant in the transfer of 1870. The second was general, to the effect that payment of interest by a tenant for life of the equity of redemption is not sufficient to keep the right of action alive as against the assets of the covenantor.

The first point was put in this way: it was said that the payments made by *Ellen Walker* ought to be attributed solely to her own covenant. I am unable to accept this proposition. Her covenant was expressly entered into by way of further security, and it would be a strange thing to hold that such a covenant had the effect of impairing the mortgagees' rights, as would be the case if the argument prevailed. The answer is that, in the language of the admissions, she paid the interest on the mortgage debts; moreover, the point seems to be covered

by the decision of the Court of Exchequer in *Forsyth* v. *Bristowe* (1), which is also an authority on the second point.

I proceed to consider the second question. The 5th section, as was observed by Lord *Cranworth* in *Roddam* v. *Morley* (2), does not specify by whom the payment is to be made. But there can be no doubt that it must be made by a party interested; payment by a mere stranger will not suffice. The question arose in that case on a specialty in which the heirs were bound, and the object of the suit was to recover payment out of the obligor's real estate. Lord *Cranworth*, with the assistance of the two learned common law Judges who were called in, held that the effect of payment of interest by the devisee for life of the real estate was to set free the action generally, and accordingly that the action could be maintained against the remainderman of the lands devised. I followed the principle of this decision in *In re Hollingshead* (3), a case of a simple contract debt not charged on the debtor's real estate, and consequently falling within the statute 3 & 4 Will. 4, c. 104, which makes the debtor's real estate assets in equity for payment of his simple contract debts as well as his specialty debts. There the interest had been paid by the devisee for life of the real estate, who was also executrix, and the exact point decided was that the payment of interest was sufficient to keep the right of action alive against all persons interested in remainder. The *Statute of Limitations* applicable to that case is not the statute relied on in this action. For the Defendant, it is said that payment of interest by the tenant for life of the mortgaged lands is not sufficient to keep the right of action alive against the general assets of the mortgagor debtor by virtue of the covenant in the mortgage deed. This gives rise to the question, what is the relation of such a tenant for life to the debt? Undoubtedly the hand of the tenant for life in possession of the mortgaged lands is the proper hand to make the payment of interest. That is peculiarly the case where, as here, the covenantor settles the mortgaged lands without reserving any interest to himself except his right to have recourse to the land in the

(1) 8 Ex. 716. (2) 1 De G. & J. 1, 18.
(3) 37 Ch. D. 651.

CHITTY, J
1893
DIBB
v.
WALKER

event of his being called upon to pay. It may be admitted that such a tenant for life could not be sued in an action at law by the mortgagee. But in equity it is plain that the tenant for life could be sued by the mortgagee covenantee in a foreclosure suit, and that he is liable in such an action to be deprived of the rents and profits by the appointment of a receiver if the interest is not kept down. He is liable also to the remainderman for default in payment of the interest, and also, in such a case as the present, to the settlor, who has a right to have recourse to the estate as an indemnity against the interest of all the persons liable by virtue of the indentures whether at law or in equity to pay the interest. *Ellen Walker* was the person primarily liable to make the payment. But this point appears to be covered by the principle of the decision in *Roddam* v. *Morley* (1), to the effect that such a payment sets free the action generally, and also by the case of *Forsyth* v. *Bristowe* (2). There, in an assignment of the equity of redemption by the mortgagor, the assignee covenanted to pay interest on the mortgage debt; no distinction for the purpose of the statute under consideration can be drawn between a covenant for payment of interest by an assign of the entire estate in the equity of redemption and a like covenant entered into by an assign taking merely a life estate in possession in the equity of redemption. This observation applies to *Ellen Walker's* covenant; and I think it is immaterial whether the covenant is entered into on the assignment or by a subsequent deed by way of further security to which the representative of the covenantor is party. The additional reason given by Lord *Wensleydale* in delivering the judgment of the Court in *Forsyth* v. *Bristowe* is not a mere *dictum*, but a ground of the decision itself. He lays it down that payment of interest by the assignee of the equity of redemption (which plainly includes tenant for life of the equity of redemption) is clearly payment of interest, and that the statute 3 & 4 Will. 4, c. 42, s. 5, did not expressly require that it should be made by the party liable or his agent; and that if it implied it, the assignee of the equity of redemption who covenants to pay is sufficiently an

(1) 1 De G. & J. 1. (2) 8 Ex. 716.

agent for that purpose. In regard to this doctrine of agency, it is to be observed that payment of interest by an agent is not expressly mentioned in the 5th section of the statute under consideration; but it appears to be imported from the other part of the section, which speaks of acknowledgment made by writing by the party liable by virtue of the indenture or specialty, or his agent, and by the general tenor of the section, which treats payment of interest as an acknowledgment. In *Chinnery* v. *Evans* (1), Lord *Westbury* speaks of the large import and meaning attributed to the words "person by whom the same shall be payable, or his agent," which occur in the 40th section of the statute 3 & 4 Will. 4, c. 27. Many other authorities were cited at the Bar; but I think it is unnecessary to consider them, and that I may rest my decision on the second point in *Forsyth* v. *Bristowe* (2), which has not been overruled or questioned.

I hold, then, that the payment of interest by *Ellen Walker* was sufficient to keep the right of action alive against the Defendant as the surviving devisee and executor of the covenantor.

Solicitors: *Oldman, Clabburn & Co.*, agents for *Albert Iveson & Son, Gainsborough; Gedge, Kirby, & Millett.*

(1) 11 H. L. C. 115. (2) 8 Ex. 716.

G. M.

CHITTY, J.

1893

March 8, 9, 24.

In re ENGLISH BANK OF THE RIVER PLATE. *Ex parte* BANK OF BRAZIL.

Bills of Exchange—Drawn abroad accepted Payable in London—Liquidation of Acceptors—Protest for Non-Payment—Protest for better Security—Commission—Notarial Expenses—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 51, *sub-ss.* 2, 5; *s.* 57, *sub-s.* 1 (*c*); *ss.* 65–68, *s.* 97.

A bank at *Rio de Janeiro* drew bills of exchange on a bank in *London*, and they were duly accepted by such bank.

The *London* bank went into liquidation before the bills matured, and, after the stoppage of the bank, the holders had them protected for better security, and they were accepted *supra* protest for the honour of the drawers by the drawers' *London* bankers.

The bills were duly presented for payment to the acceptors and were protested by the holders for non-payment. They were then presented to the bankers of the drawers, who paid the principal money due on the bills together with the notarial charges thereon, which consisted partly of the expenses of protest for non-payment and partly of the expenses of protest for better security. The bankers of the drawers also charged the drawers a commission for accepting the bills.

The drawers were admitted to prove in the winding-up of the *London* bank for the amount of the bills, and they claimed to prove also in respect of the notarial charges and commission. This claim the liquidator rejected:—

Held, upon summons for leave to prove in respect of the latter claims that the applicants were entitled to prove for the expenses of protest for non-payment, as being expenses falling within sect. 51, sub-sect. 2 and sect. 57, sub-sect. 1, of the *Bills of Exchange Act*, 1882, but that they were not entitled to prove in respect of the expenses of protest for better security nor for the commission, as under sect. 57 such expenses only as are "necessary" are recoverable.

"The protest" mentioned in sect. 68, sub-sect. 6, means the protest for non-payment which is necessary.

The Act not only does not give but excludes the expenses of the protest for better security.

ADJOURNED SUMMONS.

The *Bank of Brazil*, a company duly registered under the laws of *Brazil* and having its head office in *Rio de Janeiro*, drew at *Rio de Janeiro* certain bills of exchange upon the *English Bank of the River Plate* in *London*.

Such bills, amounting in the aggregate to the sum of £218,391 9*s.* 8*d.*, were payable to the order of the persons or

firms specified therein, and were duly accepted by the *English Bank of the River Plate* in *London* where they were payable.

The *English Bank of the River Plate* stopped payment in the month of July, 1891, and went into liquidation. After the stoppage the holders of some of the bills had them protested for better security, and the whole of the bills were after the stoppage accepted *supra* protest for honour of the drawers by the bankers in *London* of the drawers.

All the bills were duly presented for payment to the acceptors, and were protested by the holders thereof for non-payment; they were then presented to the bankers of the drawers, who under their acceptance paid *supra* protest for honour of the drawers the principal money due on such bills, together with the notarial charges thereon.

The notarial charges so paid by the bankers of the drawers amounted in the aggregate to £167 16*s.* 4*d.*

The bankers of the drawers charged the drawers, the *Bank of Brazil*, a commission of ¼ per cent. for accepting the bills and paying them at maturity after their dishonour by the acceptors; such commission amounted in the aggregate to £533 15*s.*, which sum was paid by the drawers to their bankers.

In the month of February, 1892, the drawers of the bills tendered a proof, and claimed to prove in the winding-up of the *English Bank of the River Plate* for the amount of the principal money, notarial charges and commission.

The liquidator of the *English Bank of the River Plate* on the 31st of March, 1892, admitted the proof as to the principal money and notarial charges and rejected the claim for the commission; but after the admission of the amount of the principal money and notarial charges the liquidator gave notice of rejection of the claim for the notarial charges amounting to £167 16*s.* 4*d.*, such sum being made up of the sum of £108 10*s.* 4*d.* for protest for non-payment and the sum of £59 6*s.* for protest for better security.

This was a summons taken out by the *Bank of Brazil* and which had been adjourned into Court for an order that notwithstanding the decision of the liquidator the above sums of £167 10*s.* 4*d.* and £533 15*s.* claimed by the bank might be

CHITTY, J
1893
In re ENGLISH BANK OF THE RIVER PLATE.
Ex parte BANK OF BRAZIL

admitted for proof against the assets of the *English Bank of the River Plate.*

Whitehorne, Q.C., and *T. Beven*, in support of the summons:—

The Applicants are entitled to prove for the expenses of protest for non-payment as they are clearly within sect. 51, sub-sect. 2, of the Act.

As to the expenses of protest for better security they are recoverable against the acceptors under sub-sect. 5 of the same section, which enacts that where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before the bill matures, as happened in this case, the holder may cause the bill to be protested for better security against the drawer and endorsees. The expenses of protesting for better security are part of the expenses of re-exchange which are recoverable from the acceptors: *Walker* v. *Hamilton* (1); *In re General South American Company* (2); *In re Gillespie* (3); *In re Commercial Bank of South Australia* (4).

We submit also that we are entitled to prove for the commission paid by us to our bankers for the acceptance of the bills for honour: *Prehn* v. *Royal Bank of Liverpool* (5).

Latham, Q.C., and *Reginald Bray*, for the Liquidator of the *English Bank of the River Plate*:—

The acceptor is liable to the drawer only for what he is liable to pay or has paid the holder.

The expenses of protesting for better security were incurred before breach; a holder must present his bill for payment at maturity before he can charge the acceptor for honour. Where the acceptor as here suspends payment before the bill matures, sect. 51, sub-sect. 5, provides that the holder "may" cause the bill to be protested for better security; but such protest is not necessary, and under sect. 67 only necessary expenses are recoverable against the acceptor.

In re Gillespie is inconsistent with the rules laid down by Lord *Herschell* in *Bank of England* v. *Vagliano Brothers* (6).

(1) 1 D. F. & J. 602.
(2) 7 Ch. D. 637.
(3) 18 Q. B. D. 286.
(4) 36 Ch. D. 522.
(5) Law Rep. 5 Ex. 92.
(6) [1891] A. C. 107.

No case is to be found nor is there any suggestion in any of the text-books that the expenses of protest for better security are part of the damages for re-exchange.

The claim for commission must also fail on the same grounds. In *Prehn* v. *Royal Bank of Liverpool* (1), the action was brought not on a bill of exchange but on a special contract.

Whitehorne, in reply.

1893. March 24. CHITTY, J.:—

The Applicants, who are the drawers of bills of exchange for upwards of £218,000, have been admitted to prove for the amount of the bills against the estate of the acceptors, the company in liquidation. The bills were drawn in *Brazil* and accepted payable in *London*. The Applicants seek to prove also for certain notarial expenses, which they have paid to the holders of the bills, and also for a commission which they (the drawers) have paid to their own bankers. The questions are whether they are entitled to prove for these additional sums.

The notarial expenses claimed consist, first, of a sum of £108 10*s.* 4*d.*, and, secondly, of a sum of £59 6*s.* The first sum represents the expenses of the protest for non-payment by the acceptors which were paid by the holders and repaid to them by the drawees. These expenses fall within sect. 51, sub-sect. 2, of the *Bills of Exchange Act*, 1882, which renders protest for non-payment necessary, and within sect. 57, sub-sect. 1, of the same Act, which enacts that the holder may recover from any party liable on the bill, and that the drawer who has been compelled to pay the bill may recover from the acceptor the expenses of protest, "when protest is necessary." It is clear, then, that the Applicants are entitled to prove for the £108 10*s.* 4*d.*, and it was so admitted by the Respondents' counsel.

The second sum, claimed for expenses, is for the expenses of protest for better security against the drawers. After the bills had been accepted, and before they had matured, the acceptors suspended payment, and the holders caused the bills to be protested for better security against the drawers. The bankers of

(1) Law Rep. 5 Ex. 92.

CHITTY, J.
1893
In re English Bank of the River Plate.
Ex parte Bank of Brazil

the drawers in *London* then intervened and accepted the bills *supra* protest for the honour of the drawers; and, on the bills having matured and being protested for non-payment by the acceptors, the bankers, as acceptors for honour, paid to the holders the amount of the bills and also the expenses of both the protests which had been paid by the holders.

The general rules for dealing with the *Bills of Exchange Act* are laid down by Lord *Herschell* in *Bank of England* v. *Vagliano Brothers* (1). It was intended to be a code of the law relating to negotiable instruments, and the proper course is, in the first instance, to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law; no appeal ought to be made to the previous law except upon some special ground. Examples of special grounds are given by Lord *Herschell*—such, for instance, as a provision in the statute being of doubtful import, or words being found in the statute which had previously acquired a technical or special meaning. *In re Gillespie* (2) was decided before the judgment was given in the House of Lords in the *Vagliano Case.* It was submitted for the Respondents that the decision was inconsistent with the rules laid down by Lord *Herschell,* but it was at the same time admitted, and as I think rightly admitted, that the decision in *In re Gillespie* must be accepted by me as binding, and I must not be understood as in any way questioning the authority of that decision. It turned principally on the 57th and 97th sections of the Act. The point decided was that, notwithstanding the 57th section, the drawer of a foreign bill of exchange upon an acceptor in *England* is entitled, upon the bill being dishonoured and protested, to recover from the acceptor damages in the nature of re-exchange, which the drawer is by the foreign law liable to pay to the holder of the bill. In dealing with the words "where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows," which occur at the beginning of the 57th section, Mr. Justice *Cave* appears to have been of opinion that these words were inserted for the purpose of a specially endorsed writ; and,

(1) [1891] A. C. 107, 144. (2) 16 Q. B. D. 702; 18 Q. B. D. 286.

although some of the damages mentioned in the section would before the Act have been deemed unliquidated damages, yet that the section was not intended to take away the right which the drawer previously had by the common law, including the law merchant, to recover from the acceptor any special damages of an unliquidated character which he can prove that he has sustained. Accordingly he held that the drawer was entitled to recover as unliquidated damages by way of re-exchange the amount fixed by the law of *Tobago*, where the bills had been drawn. The Court of Appeal affirmed his decision with a reduction of the amount; they neither accepted nor rejected his opinion on the general question of the right to recover unliquidated damages having been left unaffected by the statute. The grounds of their decision appear particularly at page 292 of the report. Stated shortly, they are that the case of bills drawn abroad and dishonoured in this country is not dealt with by the 57th section, and that, being a *casus omissus*, it fell within the 97th section, which must be read with the 57th section. They confined the operation of the general terms of the first sub-section of sect. 57 to bills dishonoured at home.

In the case before me the argument in support of the claim for the expenses of the protest for better security were—first, that such expenses were given by the Act; secondly, that if not given they were not excluded; and, thirdly, that they fell within the 97th section and were recoverable under the head of damages under the common law doctrine of re-exchange. For the Respondents, all these propositions were denied, and it was argued that these expenses were excluded by the terms of the Act.

In dealing with the claim for expenses, the first and second points may conveniently be taken together. The material sections of the Act are the 51st, sub-sects. 2 and 5, sect. 57, sub-sect. 1 (*c*), and the *fasciculus* of sects. 65 to 68, both inclusive under the head of acceptance and payment for honour. Now, it is plain, on a comparison of the 51st and 57th sections, that a distinction is drawn between protests which are necessary and those which are not necessary, but merely permissive. Where the bill is dishonoured by non-payment, it "must" be duly protested for non-payment (sect. 51, sub-sect. 2); where the acceptor

CHITTY, J.
1893
In re ENGLISH BANK OF THE RIVER PLATE.
Ex parte BANK OF BRAZIL.

(as here) suspends payment before the bill matures, the holder "may" cause the bill to be protested for better security (sect. 51, sub-sect. 5); and the 57th section makes the expenses of protest recoverable against the acceptor only when the protest is necessary. It appears to me that the language of these sections is definite and precise, and that the expenses of an unnecessary protest are not recoverable. I cannot see my way to deal with the case of expenses of protest on the principle adopted by the Court of Appeal in *In re Gillespie* (1) in reference to the question of damages for re-exchange which they had to decide, or to treat it as a *casus omissus* letting in the 97th section. Lord Justice *Lindley* said (2) that sub-sect. 1 of the 57th section was not addressed to the case of a bill, the drawer of which is liable for damages for re-exchange. It appears to me that the same sub-section is addressed to the case of the expenses of protest, and that the case is there specifically dealt with, and that the expenses recoverable are limited to those of a necessary protest.

Further the object of the protest is, as its name imports, to enable the holder to obtain better security. It is a condition precedent to the acceptance *supra* protest for the honour of the drawer or other party liable on the bill (sect. 65, sub-sect. 1). The acceptance for honour of the drawer is for his benefit, operating to sustain his credit. The protest and the acceptance are both voluntary acts; and it may well be that the Legislature did not think fit to throw the expenses of such acts on the acceptor. The payer for honour, on paying to the holder the amount and "the notarial expenses incident to its dishonour, is entitled to receive both the bill itself and the protest" (sect. 68, sub-sect. 6). "The protest" here means the protest for non-payment by the acceptor which is necessary in order to charge the acceptor for honour.

By the 97th section, sub-sect. 2, the rules of common law, save in so far as they are inconsistent with the express provisions of the Act, are to continue to apply to bills of exchange. Finding, as I do, express provisions on the subject inconsistent with the supposed rules of common law, I think that the 97th section has no application. For the above reasons I think that the Act not

(1) 18 Q. B. D. 286. (2) 18 Q. B. D. 292.

only does not give, but excludes the expenses of the protest for better security. The payment of these expenses by the drawers through their *London* bankers to the holder was, therefore, a payment which they were not compellable to make, and the amount cannot be recovered by them from the acceptors.

But, assuming that the right to these expenses is not excluded by the other parts of the Act, and that the 97th section is let in so as to apply to these expenses as a *casus omissus* in the other parts of the Act, the Applicants are in no better position. They claim the expenses according to the third head of the argument as damages for re-exchange. All the well-known treatises on bills of exchange, such as *Byles* (1), *Chitty* (2), *Chalmers* (3), and *Daniel* (4) (*America*), have been examined, and the decided cases have been searched through, and the result is that no trace or suggestion can be found of the expenses of a protest for better security being allowed as part of the damages for re-exchange. No evidence has been adduced of any mercantile custom justifying the claim. It must then be rejected.

The remaining question relates to the commission. It consists of a sum of £533 15*s.*, being at the rate of ¼ per cent. paid by the Applicants to their bankers for the acceptance of the bills for honour and for providing the money required to meet that acceptance. It is then the sum paid by the drawers for borrowing or obtaining an advance of money to meet the bills for their honour. The 57th section includes in the damages recoverable from the acceptor interest on the bill—see sub-sect. 1 (*c*)—and the Applicants will be entitled to be paid this interest from the maturity of the bills out of the surplus of the acceptor's estate, in accordance with the decisions on the 26th rule of the General Order of November, 1862: *Buckley* on the *Companies Acts* (5). My observations on the claim for the expenses of the protest for better security apply generally to the claim for commission. The claim was supported principally on the 97th section and the doctrine of damages for re-exchange. Here also the text-books and the authorities have been searched with the same result as

(1) 14th Ed. p. 449.
(2) 10th Ed. p. 337.
(3) 2nd Ed. pp. 193–95.
(4) Vol. ii. p. 468.
(5) 6th Ed. pp. 368, 686.

CHITTY, J.
1893
In re ENGLISH BANK OF THE RIVER PLATE.
Ex parte BANK OF BRAZIL.

above mentioned, and no evidence has been adduced of any mercantile custom. One authority only was relied on—viz., *Prehn* v. *Royal Bank of Liverpool* (1). But the action there was brought not on the bill of exchange, but on a special contract, which justified the Court in allowing the claim for commission as special damages. The decision, therefore, is not in point. To this I add that the normal measure of damages for non-payment of money is interest where interest is allowable by contract or by law. The claim for commission cannot, therefore, be sustained.

Solicitors: *Merriman, Pike, & Merriman; Freshfields & Williams.*

(1) Law Rep. 5 Ex. 92.

G. M.

BARBER *v.* PENLEY.

NORTH, J.

1893

March 17, 21.

[1893 B. 1095.]

Nuisance—Obstruction to Highway—Theatre.

The lessee of a theatre held liable for obstruction to access to adjacent premises, by reason of the assembling of a crowd previously to the opening the doors of the theatre.

The Court refused an injunction to the occupier of the adjacent premises, where such obstruction existed at time of action brought, but had since ceased by reason of the action of the police; but gave the Plaintiff costs.

The law of nuisance from obstruction of a highway discussed.

THIS was a motion for an interlocutory injunction, treated as the trial of an action.

The Plaintiff had a lease for twenty-one years, granted in August, 1892, of premises known as *Waterloo Chambers, Wych Street, Strand,* which she used as a common lodging-house for men of the working classes. The only access to her premises was by a door adjoining the pit entrance to the *Globe Theatre.*

The Defendant was lessee of the *Globe Theatre.* Shortly before the issue of the writ, he had commenced the performance of a play called *Charley's Aunt,* which became at once extremely popular. The doors of the theatre were opened for the evening performances at 7.30 P.M., and crowds of persons collected every evening in the street outside the pit entrance, previously to the opening of the doors. The crowd began to collect about 5.30 P.M., and, as the Judge held on the evidence at the time of the issue of the writ, during the two hours previous to the opening of the doors, occupied the pavement in front of the Plaintiff's premises in such way as to obstruct access to them, notwithstanding that policemen had been employed at the expense of the Defendant to preserve order.

The Plaintiff complained that, by reason of such obstruction, her customers were impeded in getting to her house at the hour when, after their day's work, they were in the habit of seeking lodgings. The evidence shewed also that both parties had made representations to the police authorities, and that

NORTH, J.
1893
BARBER
v.
PENLEY.

previously to the hearing of this motion additional policemen had been employed, and the pavement in front of the premises was then kept entirely clear. The motion before the Court was for an injunction till trial, to restrain the Defendant from carrying on the *Globe Theatre*, so as (by causing crowds to assemble or otherwise) to obstruct the access to or egress from the Plaintiff's premises, *Waterloo Chambers*.

Cozens-Hardy, Q.C., and *Fawcus*, for the Plaintiff:—

The collection of large crowds to the obstruction of the highway is a nuisance in point of law, for which the person causing such obstruction, whether intentionally or otherwise, is liable: *Betterton's Case* (1); *Rex* v. *Moore* (2); *Hawkins'* Pleas of the Crown (3); *Walker* v. *Brewster* (4); *Rex* v. *Carlile* (5).

Everitt, Q.C., and *George Henderson*, for the Defendant:—

The Plaintiff cannot expect in the neighbourhood she has chosen, and for a house occupied as a lodging-house such as hers, the same quiet and comfortable access as she would have to a private house in a residential street. There was no obstruction that would affect her lodgers. The Defendant is not liable unless the performances are such as to make it likely and probable that an obstruction would be created. There was no reason to suppose that an obstruction would be created. The police are the persons to regulate the traffic, and the Defendant has no right to take the necessary steps to prevent obstruction; he did his best: *Rex* v. *Moore*; *Betterton's Case*.

There is a difference between this case and many of those decided, where the obstruction is caused by something perceptible in the street itself, such as the exhibition of caricatures in a window: *Rex* v. *Carlile*, or the letting off of fireworks visible from the highway: *Walker* v. *Brewster*.

A person who carries on a lawful performance on his own premises is not liable because persons coming to see it crowd the thoroughfare: *Inchbald* v. *Robinson* (6); *Jenkins* v. *Jackson* (7).

(1) Holt, 538.
(2) 3 B. & Ad. 184.
(3) Bk. i. c. xxxii. ss. 6, 7, 8th ed. p. 693.
(4) Law Rep. 5 Eq. 25.
(5) 6 Car. & P. 636.
(6) Law Rep. 4 Ch. 388.
(7) 40 Ch. D. 71.

Cozens-Hardy, in reply: *Inchbald* v. *Robinson* (1) was really a *quia timet* action.

[Sir *A. Watson*, Q.C., *amicus curiæ*, referred to *Bellamy* v. *Wells* (2).]

NORTH, J. (stated the nature of the action, and continued):—

It was said that the Plaintiff had taken these premises with the knowledge that there was the theatre next door, which is quite true, and that is a matter which is deserving of consideration. A person who deliberately goes next door to a theatre cannot expect to have precisely the same amenities in *Wych Street* that the lessee of a private house in a street occupied by private houses only in the *West End* would expect; but still such a lessee has a right to expect that no nuisance shall be committed to the prejudice of such person. The collection of playgoers in the street would to some extent be a public nuisance, if a nuisance at all; but certainly it would be a private nuisance to the Plaintiff, in respect of which, if proved, the Plaintiff would have a right of action.

[After considering the evidence as to the obstruction, on which he considered, that when the writ was issued there was, previously to the opening of the door of the theatre, such obstruction as to render access to the Plaintiff's premises very difficult, his Lordship continued:—]

Now, that being the position of matters, I wish to refer to some of the cases in which useful observations have been made upon this subject. I will refer as the oldest to *Betterton's Case* (3), a case more than 200 years old—7 Will. 3. It is not a very useful case in itself; but in the judgment Chief Justice *Holt* states, "That playhouses are not in their own nature nuisances; but only as they draw together great numbers of people and coaches, and sharpers thither, which prove generally inconvenient to the places adjacent." That case, which is found not only in *Holt's* Reports, but in one or two others, is one of the subjects of the statement contained in *Hawkins'* Pleas of the

(1) Law Rep. 4 Ch. 388. (2) 39 W. R. 158.
(3) Holt, 538.

NORTH, J.
1893
BARBER v. PENLEY

Crown (1), where it refers to common stages for rope-dancers and common gaming-houses being nuisances. In the next section it says: "Also it hath been holden, that a common playhouse may be a nuisance, if it draw together such numbers of coaches or people, etc., as prove generally inconvenient to the places adjacent. And it seems to be a proper distinction between playhouses and the nuisances mentioned in the previous section, that playhouses, having been originally instituted with a laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, are not nuisances in their own nature, but may only become such by accident, whereas the others cannot but be nuisances." Assuming that that is a true historical statement of the playhouses in their original institution, I doubt whether that is the object for which they are carried on at the present day. I should state this before referring to the cases, that Mr. *Penley* says in his affidavit that the crowds are to a considerable extent idle loafers and hangers-on, who are always to be found in the neighbourhood of theatres. I am not satisfied that this is so. I doubt whether that class of persons is found before the theatres are open, though they may possibly be towards the end of the performance. But I must say that if that is correct, which I doubt, still I do not see that that can prove the Defendant's case; I think it will make it worse, because if persons in this way who are not going to the theatre are attracted in the street by seeing crowds who are going to the theatre it is a separate and distinct ground for a nuisance being occasioned. To proceed with the cases which I was referring to, the next I wish to mention is *Rex* v. *Cross* (2), where the nuisance was permitting a coach to stand in the public highway for some time opposite *Drummond's Bank* near *Charing Cross*. Lord *Ellenborough* there in his judgment puts the case of a rout, and says: "Is there any doubt if coaches on the occasion of a rout, wait an unreasonable length of time in the public street, and obstruct the transit of His Majesty's subjects who wish to pass through it in carriages or on foot, the persons who cause and permit such coaches so to wait are guilty of a nuisance?" and so on. Then

(1) Bk. i. c. XXXII. s. 7, 8th ed. p. 693. (2) 3 Camp. 224, 226.

he says: "A stage coach may set down or take up passengers in the street, this being necessary for public convenience: but it must be done in a reasonable time; and private premises must be procured for the coach to stop in during the interval between the end of one journey and the commencement of another"—an observation which I think might well be taken into consideration by some of the proprietors of omnibuses of the present day. Then there is another case in the same volume—*Rex* v. *Jones* (1)—where it was held to be an indictable offence for a timber merchant to cut logs of timber in the street adjoining his timber-yard, and Lord *Ellenborough* said: "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway; but this must be done with promptness." Then he gives other illustrations. Then at the end, speaking of the particular case before him, he says: "I cannot bring myself to doubt of the guilt of the present defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway into his timber-yard; and if the street be narrow, he must remove to a more commodious situation for carrying on his business." Then there is the well-known case of *Rex* v. *Moore* (2). That was a case in which the defendant used his own premises for the lawful purpose of pigeon-shooting upon them; but the result was that it attracted considerable crowds in the neighbourhood. In the judgment Lord *Tenterden* says: "The defendant asks us to allow him to make a profit to the annoyance of all his neighbours; if not, it is said we shall strain the law against him. If a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable. And this is an old principle." Mr. Justice *Littledale* says: "It has been contended that to render the defendant liable, it must be his object to create a nuisance, or else that that must be the necessary and inevitable result of his act. No doubt it was not his object, but I do not agree with the other position; because if it be the *probable* consequence of his act, he is answerable as if it were his actual object. If the experience of mankind must lead

(1) 3 Camp. 230. (2) 3 B. & Ad. 184, 188.

NORTH, J.
1893
BARBER
v
PENLEY

any one to expect the result, he will be answerable for it." Then Mr. Justice *Taunton* cited the passage I have referred to from *Hawkins'* Pleas of the Crown, and said that case was a very similar case. Again, *Rex* v. *Carlile* (1) was a case in which a man had put prints or figures in his window, that is to say, within his own premises; but they were visible in the street, and they were of such a character that they caused crowds to collect there. The case is long, and I do not intend to go through it in detail. But Mr. Justice *Park* cites the cases that I have referred to, and then he says (2): "If a place is situate near a highway, and the defendant do that which causes the persons passing to be prevented from passing as they ought to do, and, besides this, people are annoyed in the occupation of their houses, this is a nuisance, for which the party is indictable." I would remark upon this that the people could not be annoyed in the occupation of their houses by exposing prints in a window. It is not like a great noise, or a bad smell, or anything of that sort. They only could be annoyed in the occupation of their houses by the blocking up of the roads by the crowds collecting there. Then, again, he says, at the end of the judgment (3): "The question therefore really is" (this was a question for a jury), "whether you think the defendant has by the acts proved caused an obstruction of the public highway to the nuisance of persons passing along that way, and to the persons residing in that neighbourhood." Then there was another case of *Benjamin* v. *Storr* (4), where the plaintiff had a coffee-house in a narrow street near *Covent Garden*; the defendants had an extensive business as auctioneers in the same neighbourhood, having an outlet in the rear of their premises, next adjoining the plaintiff's house, where they were constantly loading and unloading goods into and from vans. I need not refer to the particular details of the nuisance said to be caused there, because it is different from the present; but Lord *Esher* says in his judgment (5): "So, if by reason of the access to his premises being obstructed for an unreasonable time and in an

(1) 6 Car. & P. 636.
(2) Ibid. 648.
(3) 6 Car. & P. 650.
(4) Law Rep. 9 C. P. 400.
(5) Law Rep. 9 C. P. 407.

unreasonable manner, the plaintiff's customers were prevented from coming to his coffee-shop, and he suffered a material diminution of trade, that might be a particular, a direct, and a substantial damage." Then there is another instructive case, before Sir George *Jessel, Original Hartlepool Collieries Company* v. *Gibb* (1). Here the plaintiffs and defendant were owners of premises abutting upon the *Thames*, and the plaintiff, who was a coal merchant, had brought a vessel which was anchored off his premises from which to unload coals; the vessel was a good deal longer than the frontage of the premises, and, therefore, necessarily projected over, and across part of the premises of the defendant. The defendant took upon himself to put a raft there to keep trespassers off his property. That, in short, is what it comes to, although his excuse was that he put the logs there for his own use; but that was a purpose for which, as the Master of the Rolls pointed out, he had not a right to use the highway of the *Thames*. There was a claim by the owner of the premises, opposite to which the ship was, for an injunction to restrain the defendant from doing that, and then there was a counter-claim by the defendant to restrain the plaintiff from bringing the ship in such a way as to project across the defendant's premises. The Master of the Rolls gave a good many illustrations in that case of what the law was, and that case is very useful for reference in such cases as this. In the course of a long judgment, only a small portion of which I am going to read, he says this (2): "In the same way it is not unreasonable that your neighbour should give an evening party occasionally and that there should be a file of carriages running across your door or opposite your door. But it would be very unreasonable if anybody did not break the file to allow your carriage to come up to your own door, and still more unreasonable, if, instead of giving parties occasionally as people do, your neighbour were to turn his house into an assembly room or for some private purpose, in consequence of which a file of carriages came every day and obstructed the carriage way to your house. I only give these as illustrations. The law is quite clear. The question of reasonableness has been said to be a question for a jury. It must be reasonable user and

(1) 5 Ch. D. 713. (2) 5 Ch. D. 722.

NORTH, J.
1893
BARBER
v.
PENLEY.

nothing else." Then, further on, when he is dealing with the counter-claim, he says (1): "Interference with reasonable access to his own property is, in my own opinion, such a nuisance as would maintain an action." Then, at the end, he says: "And they" —the plaintiffs—"have no right, as I said before, to interfere with his reasonable access, and if this had been proved, I should have given, no doubt, very small damages; but I should not have granted an injunction, for this reason, that the plaintiffs do not claim a right to obstruct. They deny the obstruction." Two other cases were cited, the first of which was *Walker* v. *Brewster* (2). In that case the defendant had been in the habit of using his premises for fêtes, and, in particular, he advertised and held on Whit Monday a monster fête in his grounds. Three subjects of complaint were put forward, and they are stated by Vice-Chancellor *Wood* (3). The first was the noise of a very powerful band of eighteen performers; the second, the evil of throwing of rockets and the risk to the plaintiff's premises of the rocket-sticks falling; then the third is: "The plaintiff complains that when these fêtes are given crowds of idle people are drawn together who, being idle, do not pass on, but occupy the road and the plaintiff's wall so as to obtain a view of the fireworks and other entertainments." Then he refers to the cases of *Rex* v. *Moore* (4) and *Rex* v. *Carlile* (5). Then he makes these useful observations (6): "The truth is, that common sense must be used with reference to transactions of this kind. If persons use their houses for the enjoyment of life, and one of the ordinary enjoyments of life is supposed to be the occasional entertainment of one's friends at a rout, it would be very difficult for anyone complaining of the noise and inconvenience caused by a rout to obtain an indictment at law, still more so, I apprehend, to persuade this Court to interfere. At all events, that differs altogether from a case like this, where the defendant makes a business and a profit by giving entertainments, which are carried on so as to induce this crowd of idle people to collect in large numbers to the annoyance of the plaintiff." He does not mean

(1) 5 Ch. D. 725.
(2) Law Rep. 5 Eq. 25.
(3) Ibid. 31.
(4) 3 B. & Ad. 184.
(5) 6 Car. & P. 636.
(6) Law Rep. 5 Eq. 33.

there that these entertainments were carried on to induce the crowds to collect outside; that was not the object for which they were held, and that is not his meaning. Then he refers to *Rex* v. *Moore* (1), and cites from Lord *Tenterden's* judgment: "'If a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable'" Then he goes on himself: "There the nuisance complained of was the trampling of grass and destruction of fences. Here it assumes a much worse form, as persons cannot reach their houses without having to force their way through these crowds." Then he refers to the other judgments in that case of *Rex* v. *Moore*, and at the end he says: "It appears to me, therefore, that a clear case of nuisance is established in the collecting of the crowd alone." Then there was another case which was relied upon by the Defendant—*Inchbald* v. *Robinson* (2)—which was a case of a circus. There were two actions, *Inchbald* v. *Robinson* and *Inchbald* v. *Barrington*, *Barrington* really being a party to both, but *Robinson* being joined in the first. There the defendant *Barrington* had taken from *Robinson* a piece of land upon which he proposed to open a circus, and an action was brought before the circus had been opened to restrain the nuisance which was anticipated from it. An injunction was granted by Vice-Chancellor *Malins*, and thereupon the erection of that circus was not completed; but *Barrington* proceeded to erect a circus upon some other land a little distance away—some 115 yards away. That was opened and used, and there were complaints of the nuisance actually arising from the entertainments carried on there, and the Vice-Chancellor granted an injunction there also; but the result was that the circus was allowed to be continued for a few days, and then it was removed. After it had been removed there was an appeal to Lord *Cairns*, L.C., and although it was not very material at that time whether there was an injunction or not, yet he held that the parties were entitled to have it dealt with, because it might prejudice the defendant in the hearing of the action if this injunction stood, and he dissolved both injunctions; but in doing so he says this (3): "There were,

(1) 3 B. & Ad. 184. (2) Law Rep. 4 Ch. 388.
(3) Law Rep. 4 Ch. 390.

NORTH, J.
1893
BARBER
v.
PENLEY

no doubt, many authorities to the effect that noise in the immediate proximity of a residence might become a nuisance, and might be abated as such; there were authorities to shew that the collecting of crowds immediately before a residence, so as to block up the approaches to it, might be a nuisance, and that if the collection of those crowds was to be attributed to the act of a particular individual, that individual might be restrained from the commission of that act." Then he said that the evidence did not satisfy him upon that point at that time that the noise of the performance was such as would occasion a nuisance to a house so far off as that of the plaintiff, or that there was any collection of crowds to such an extent as to block up the thoroughfare or occasion a nuisance to the plaintiff. The cases went on for trial, and Vice-Chancellor *Malins* at the trial granted a perpetual injunction in each case. The injunctions were the subject of appeal, and Lord Justice *Selwyn* says at the beginning of his judgment (1): "A number of cases have been referred to, but the law applicable to the subject is now well settled, and has been clearly laid down by Lord *Cairns* in the present case." Then, dealing with the particular case, he speaks first of all of the case of *Inchbald* v. *Robinson*, in which it will be remembered that the building had never actually been opened as a circus, and then, after referring to *Rex* v. *Moore* (2) and *Walker* v. *Brewster* (3), and so on, he came to the conclusion that there was no case for an injunction proved there. He said that *Rex* v. *Moore* and *Walker* v. *Brewster* were both cases of outdoor performance, where persons were assembled outside the ground, and then he adds (4): "The plaintiff cannot complain of the temporary crowding occasioned by people going to the circus or leaving it; and no such continuous crowding is shewn as to justify the interference of the Court. *Inchbald* v. *Barrington*"—that is the second action—"stands on a different footing, for the case is not rested merely on the crowds, but it is alleged that the noise of the performance is a nuisance. I dismiss the first point," that is as to crowds, "for I do not think that any such crowding as amounts to a nuisance is proved."

(1) Law Rep. 4 Ch. 394.
(2) 3 B. & Ad. 184.
(3) Law Rep. 5 Eq. 25.
(4) Ibid. 4 Ch. 396.

Then, as to the noise, it was held that there was evidence before the Court which had not been before Lord *Cairns* on interlocutory application, and he came to the conclusion there that the injunction granted was right. Then Lord Justice *Giffard* says (1): "In *Inchbald* v. *Robinson* the whole of the case made by the bill is, that the circus will draw together a great crowd of disorderly persons. The evidence in support of this allegation is insufficient, and if an injunction in such a case were to be granted and upheld, it would prevent the setting up near a dwelling-house of any exhibition likely to be attended by a large number of people." It was said that this was an authority to shew that the Plaintiff would have no right to complain of the nuisance caused by persons coming to and going from the theatre; but, in my opinion, that does not apply to the case I have to deal with. It is not here a coming to and going from that is complained of: it is the nuisance caused by those who intend ultimately to get into the theatre collecting in the street outside the theatre and remaining there, which is quite a different thing from coming to or going from it. There is no complaint here of the use of the theatre, either as regards persons who come to it without having to stop in the street so as to be a nuisance to the Plaintiff, nor is there any complaint made here of the persons who are going away from the theatre at the end of the performance. It was also said that there was a distinction between outdoor and indoor performances, that this case was an authority to that effect. That there may be a distinction in detail and result I can quite understand; but I do not see where the distinction in principle is. If a defendant does within his premises what causes a nuisance outside, it does not matter whether the nuisance is caused by what goes on inside being actually visible outside and so causing the crowd to collect, or whether, by reason of what is going on, or what is about to go on inside, he causes the crowd to collect. It seems to me the principle of both is the same, though the application is somewhat different, and that really there is no difference in principle is also shewn by the other only case I have to refer to—to the case of the *Pelican Club*, before Mr. Justice *Romer*—*Bellamy* v.

(1) Law Rep. 4 Ch. 397.

NORTH, J.
1893
BARBER
v.
PENLEY

Wells (1). That, it will be remembered, was a case where a house in *Gerrard Street, Soho,* was used as a club, and, in particular, there were boxing entertainments, or prize-fight entertainments, as they might be called, that took place in it. Of course, nothing that took place within was actually visible outside; but the result was that the nature of the entertainment inside was such that, as was clearly proved, large crowds, and noisy crowds, did collect outside with a view to hearing the earliest information as to what had actually taken place inside. That seems to me a case in this respect very like the present. An injunction was granted there, because Mr. Justice *Romer* held on the facts that the entertainments held inside were such as to make the collecting of these crowds outside a probable consequence. So here it is said by Mr. *Everitt* that he could not prevent, and could not anticipate, the crowds outside. I can quite understand that, on the night of the first performance of a piece, a great gathering outside might possibly not have been anticipated, and might not have been said to be the probable result to be foreseen by those who hold the entertainment inside. But, at any rate, as soon as the piece had run a few nights, and it was then found what a crowd did collect outside—which state of things was certainly reached before this action was commenced—then a state of things had supervened which did make it probable that for some time to come there would be this collection of crowds outside—that is to say, until the piece had run so long that the public began to cease to have so much interest in it, and did not collect in such numbers.

Then there was a second point. In that case an injunction was granted to restrain noise from cabs and carriages; a case we have nothing to do with here. It was only granted there to restrain that noise between midnight and seven o'clock the next morning. There was no restraint imposed upon such noise caused by cabs and carriages coming and going as might take place at what might be called for this purpose perhaps a reasonable hour of the evening. But in that case Mr. Justice *Romer* pointed out that the use of a house as a club for a

(1) 39 W. R. 158.

purpose of that sort—and the same thing might be said, and indeed he did say it, of a theatre too—was not the use of a house that was to be gauged in precisely the same way as a private dwelling-house where entertainments take place now and then, the distinction being very great between that and the case where a performance takes place nightly. One other case was referred to—*Jenkins* v. *Jackson* (1)—in which Mr. Justice *Kekewich* refused to grant any injunction to restrain a nuisance from crowds passing up and down stairs to go to an entertainment. That again does not apply here: it is not a question of crowds passing backwards and forwards, but persons stopping in the street. I have not the least doubt that if it had been found that a crowd collected on the stairs until the door opened, his view would have been very different from what it was.

Then it is said that the Defendant could not prevent a crowd from gathering, and that it was a police matter. It does appear that the Defendant did from the first tell the police that assistance would be necessary to regulate the crowds; but I find that the Plaintiff did that also, and, although that was done, no such interference took place as prevented the arising of the nuisance complained of. I think the Defendant's own evidence confirms the Plaintiff's evidence as to crowds that collected, because he himself says that, although at half-past five there is no crowd to complain of, it is not until half-past six that a large number of persons then collect, and I take it that is an admission that from that time onwards at any rate there were such persons. As regards the Defendant's suggestion that he could not help it, if in point of fact the nuisance exists which is caused by him, not with an object to cause that nuisance, but by reason of the entertainment he carries on, and to which he invites the public to come, it seems to me that it is a case in which either he must discontinue his performance or the nuisance must be prevented. In this case the police have taken the matter into their control, and it is clear from the affidavit of the Plaintiff in reply that they can effectually prevent the nuisance. The affidavit in reply says there has been no subject of complaint whatever since a recent date subsequent to the commencement of the action, and

(1) 40 Ch. D. 71.

NORTH, J.
1893
BARBER
v.
PENLEY

there it appears that the police have taken control and have prevented a nuisance arising. It is said the Defendant ought to prevent this; but he cannot do it—of course he has no control over the streets, he cannot put persons in the street to regulate the crowds, and one of the first things the police would do would be to prevent the interference by other persons with the traffic of the street. Still, this nuisance did exist, and in my opinion the Plaintiff is entitled to be relieved from it.

But in this case I do not propose to grant any injunction. In the first place I do not think it necessary; no injunction is wanted now, because, as the Plaintiff's own affidavit, to which I have just referred, says, the nuisance has been put a stop to. The police have taken the matter in hand, and there is no reason whatever to anticipate that they will not duly perform their duties and prevent any nuisance arising. The Plaintiff herself swears that on one occasion there was half an hour in the evening when she wanted to go out of her own house, but could not do so because of the crowd. I think that in this the case of *Original Hartlepool Collieries Company* v. *Gibb* (1) is very much in point. In that case Sir *George Jessel* pointed out clearly that if he had thought it right to grant relief upon the counterclaim, which the circumstances did not require, he would not have granted an injunction because the defendant's case was not that he had a right to obstruct, but merely that there was no obstruction. That is the view the Defendant takes here. If he had claimed a right to obstruct I certainly should have granted an injunction. As he does not claim that right, I do not think an injunction is necessary, and therefore I do not propose to grant it. Then there is another reason why I should not do so. As I have said, I have not the least doubt that the police will do all that is necessary; but, supposing that there was a great fire or a great public demonstration or anything else that caused extraordinary and sudden demand upon the services of the police, and the police could not be there to prevent the crowd, and it did happen on some particular occasion that there was a nuisance, I do not intend to expose the Defendant to a

(1) 5 Ch. D. 713.

motion to commit by reason of such an accidental interference with the Plaintiff's rights.

The result is, that I do not think it necessary to grant an injunction, and I do not propose to do so; but in my opinion the Plaintiff was justified in bringing the action, and, therefore, the order will be: "It appearing from the Plaintiff's affidavit in reply" (referring to it) "that the nuisance has been discontinued, the Court doth not think fit to make any order except that the Plaintiff's costs of the action shall be taxed and paid by the Defendant."

Solicitors for Plaintiff: *Spyer & Son.*
Solicitor for Defendant: *C. G. Sherwood.*

D. P.

In re JONES.
FARRINGTON *v.* FORRESTER.

[1891 J. 1237.]

NORTH, J.
1893
March 11, 18, 22

Infant—Marriage Settlement—Repudiation after attaining Full Age—Reasonable Time—Mortgage—Subsequent Conveyance for Value without reference to Mortgage—Covenant for further Assurance—Right of Purchaser to Indemnity against Mortgage Debt—Partition—Expenditure by one Tenant in Common in Permanent Improvements—Contribution.

A female infant, upon her marriage in 1857 at the age of eighteen, executed, without the sanction of the Court, a settlement of her reversionary interest (subject to a prior tenancy for life) in a share of real estate. The trusts of the settlement were, to pay the income to the wife, during the joint lives of herself and her husband, for her separate use without power of anticipation, and, upon the death of either, to the survivor for his or her life, and upon the death of the survivor upon trust for the children of the marriage as the husband and wife should jointly appoint, and, in default, as the survivor should appoint, and in default of any appointment upon trust for the children at twenty-one or marriage.

The husband in 1865 deserted the wife, and in 1869 she obtained a protection order. She had not heard of him since. The tenant for life died in December, 1890. Since then some income of the settled property had been paid to the wife, but she was entitled to receive that income whether she was bound by the settlement or not. She had done nothing else to confirm the settlement. There were two children of the marriage; but no appointment had been made under the power in the settlement.

In an action for the partition of the real estate:—

Held, that the wife was still entitled to repudiate the settlement.

The owner of an estate mortgaged it, and afterwards sold an undivided

NORTH, J.

1893

In re JONES FARRINGTON *v.* FORRESTER.

moiety of it. The conveyance to the purchaser did not mention the mortgage, but it contained a covenant by the vendor with the purchaser for further assurance. The two moieties afterwards devolved on different persons.

In a partition action:—

Held, that, as between the owners of the two moieties, the unsold moiety must bear the mortgage debt.

The owner of one moiety of a property, who was also tenant for life of the whole, borrowed money on mortgage which was, with other moneys, expended in permanently improving the property. In an action after her death for the partition of the property:—

Held, that the present value of the improvements (but not exceeding the sum originally borrowed on mortgage) must be borne rateably by the owners of both moieties.

Teasdale v. *Sanderson* (1) explained.

THIS was a partition action, in which a judgment directing inquiries had been given. In prosecuting the inquiries in Chambers several questions arose which were adjourned into Court for argument. A statement of facts to the following effect was prepared for the purpose of the argument.

Edward Jones, by his will dated the 28th of October, 1833, devised his shop and premises in *Eastgate Street* and *St. Werburgh's Street*, in the city of *Chester*, unto his wife *Mary Ann Jones* during her life, if she should so long continue his widow, with remainder to his two sons, *Frederick Spence Jones* and *Henry Edgar Jones*, their heirs and assigns, as tenants in common. And the testator devised his dwelling-house, with the appurtenants thereunto belonging, situate in *Christleton*, and also several specified fields, situate in *Christleton* and *Great Broughton*, and a freehold dwelling-house in *Bold Square*, in the city of *Chester*, and all other his real estate, to his said two sons, their heirs and assigns, as tenants in common. The testator died on the 14th of September, 1834. His wife and his two sons survived him.

By his will, dated the 25th of January, 1835, *Frederick Spence Jones* devised unto his brother *Henry Edgar Jones* (if and when he should attain the age of twenty-three), his heirs and assigns, his undivided moiety in the dwelling-house and fields situate in *Christleton* and *Great Broughton*, and in the dwelling-house in *Bold Square*, and also his undivided moiety (subject to the life

(1) 33 Beav. 534.

interest therein during widowhood of his mother *Mary Ann Jones*) in the shop and premises situate in *Eastgate Street* and *St. Werburgh's Street*. The testator died on the 27th of January, 1836.

On the 16th of October, 1840, *Henry Edgar Jones* (who had attained twenty-one on the 20th of July, 1840) executed a mortgage of his absolute moiety derived under his father's will, and of his contingent moiety derived under his brother's will, to secure £1500.

On the 17th of October, 1840, *Henry Edgar Jones* executed a deed by which he absolutely sold and conveyed to his mother, *Mary Ann Jones*, his contingent moiety derived under his brother's will, in consideration of a pre-existing debt of £1000 owing from him to her. This deed contained no reference to the mortgage of the 16th of October, and was not expressed to be subject to it. The deed contained the following covenant and no other: "The said *Henry Edgar Jones* doth hereby, for himself, his heirs, executors, and administrators, covenant with the said *Mary Ann Jones*, her executors, administrators, and assigns, that he, the said *Henry Edgar Jones*, his heirs, executors, or administrators, shall and will at all times hereafter, at the reasonable request, cost, and charges of the said *Mary Ann Jones*, her executors, administrators, or assigns, make, do, and execute, or cause or procure to be made, done, and executed, such other lawful and reasonable acts, deeds, matters, things, devises, conveyances, and assurances in the law whatsoever, for the more perfectly and absolutely granting and conveying, assigning, and assuring the said hereditaments and premises unto the said *Mary Ann Jones*, her executors, administrators, and assigns, as by the said *Mary Ann Jones*, her executors, administrators, or assigns, or her or their counsel in the law, shall be reasonably advised or required."

By his will, dated the 25th of August, 1840, *Henry Edgar Jones* devised and bequeathed all his real and personal estate unto *Alfred Ayrton* and *William Charles Jones*, and the survivor of them, upon trust for his wife *Mary Emma Jones*, during her life and widowhood, with remainder for his child or children (if any) absolutely; and, in case he should leave no issue, then upon

NORTH, J
1893
In re JONES
FARRINGTON *v.* FORRESTER

trust to permit his mother to receive the income of his real and personal estate during her life, so long as she should continue a widow, and from and after either of those events, he directed his trustees to pay, assign, and transfer all his real and personal estate unto *Harriett Jones* and *Isabella Jones*, the daughters of *William Charles Jones*, when and as they should respectively attain twenty-one, for their own absolute use for ever, with remainder over in case of their deaths under twenty-one.

Henry Edgar Jones died on the 1st of January, 1843. He did not leave any issue. *Mary Emma Jones* survived him. In 1846 *Mary Ann Jones* paid off the mortgage debt of £1500, and the mortgage of the 16th of October was transferred to a trustee for her.

In the year 1870, the shop and premises in *Eastgate Street* and *St. Werburgh's Street*, which were in the occupation of a company called *Dicksons, Limited*, required rebuilding. The company were willing to pay a large portion of the cost of rebuilding, provided that a lease of the premises was granted to them, and that £900 was contributed by the owners towards the expense.

On the 29th of April, 1870, *Mary Ann Jones* and her trustee executed a sub-mortgage of the mortgage for £1500, to secure the repayment with interest of a sum of £900 advanced to her by *Eliza Shaw*, *Henry Shaw*, and *Thomas Smith*. As an additional security she assigned to the mortgagees her life interest and her moiety which she had purchased from *Henry Edgar Jones*, and *Mary Emma Jones* assigned her reversionary life estate as a further security.

The whole of the £900 so raised was expended in part payment of the cost of rebuilding the premises, the balance of the cost being paid by the company. The premises were greatly improved, and the value thereof was largely enhanced by the expenditure.

Harriett Jones attained twenty-one on the 9th of October, 1859. *Isabella Jones* attained twenty-one on the 24th of October, 1860. She married *E. P. Newenham*, and died on the 3rd of March, 1890, leaving her husband, a son named *E. W. Newenham*, and three daughters, surviving her.

Harriett Jones on the 9th of May, 1857, being then eighteen

years of age, married *T. C. Barnard*, at *Melbourne*, in *Australia*. On the 8th of May, 1857, she executed a settlement, whereby, after referring to her interest under the will of *Henry Edgar Jones*, she and *T. C. Barnard* covenanted with the trustees of the settlement that all real and personal property which she, or *T. C. Barnard* in her right, might acquire during the intended coverture, should be settled upon the trusts therein declared, which were in effect that the trustees should pay the income of such after-acquired property to *Harriett Jones* during the joint lives of herself and *T. C. Barnard*, for her separate use without power of anticipation; and, after the death of either of them, to the survivor for his or her life, and, after the death of the survivor, upon trust for the children of the marriage as the husband and wife should jointly appoint, and in default of any joint appointment as the survivor should appoint, and in default of any appointment on trust for the children of the marriage being sons at twenty-one, and being daughters at twenty-one or marriage.

There were several children of the marriage, but only two were living at the date of this hearing, namely, *Amy Grace Cartwright*, the wife of *J. O. Cartwright*, and *Ada Constance Kate Firminger*, the wife of *R. M. Firminger*. The others died under twenty-one, and such of them as were daughters died without having been married.

By an order made in the county court of *Melbourne* on the 20th of February, 1869, on the application of Mrs. *Barnard*, and on her alleging her desertion on or about the 9th of October, 1865, by her husband, the Judge of that Court (who found that the desertion had commenced on the last-mentioned date) ordered that her earnings and property acquired by her since the commencement of such desertion should be protected from her husband, and from all creditors and persons claiming under him, and that such earnings and property should belong to her as if she were a *feme sole*.

Mrs. *Barnard* had never heard of her husband since he deserted her. No appointment had been made under the powers contained in the settlement.

Mary Ann Jones did not marry again, and she died on the 10th of July, 1875, having by her will, dated the 3rd of May,

NORTH, J.
1893
In re JONES.
FARRINGTON *v.* FORRESTER.

1873, devised all her real estate, and bequeathed the residue of her personal estate, to *Mary Emma Jones.*

Mary Emma Jones did not marry again. By her will, dated the 18th of January, 1889, she appointed *Fortunato Parlato, William Vassall Birkley-Forrester,* and *William Haywood Dawson,* executors and trustees of her will, and, after making some pecuniary and specific bequests and a specific devise, she devised and bequeathed all her real and personal estate not thereby otherwise disposed of to the trustees, upon trust to sell and convert the same into money, and to stand possessed of the proceeds thereof upon certain trusts. By a codicil dated the 6th of December, 1890, she revoked the residuary devise and bequest contained in her will, and in lieu thereof she devised and bequeathed all her "freehold and leasehold property not already disposed of into five equal shares," and she devised and bequeathed one-fifth part to her sister *Caroline Mona Hall,* and her niece *Louisa Jane Hall,* in equal shares; and one other fifth part to her brother *Clarence Morton Burton,* and his two daughters *Ada Katherine Moss* and *Louise Burton,* in equal shares; one other fifth part to her niece *Beatrice Mary Birkley-Forrester* absolutely; one other fifth part to her niece *Agatine Louise Farrington,* her niece *Amy Sarah Burton,* and her niece *Edith Mary Dawson,* in equal shares. And the testatrix devised and bequeathed one-fifth part to her three executors and trustees, in trust to carry out instructions which they would find in her handwriting. *Mary Emma Jones* died on the 7th of December, 1890. She did not leave any instructions in her handwriting with reference to the one-fifth part which by her codicil she devised and bequeathed to her executors.

After the death of *Mary Emma Jones* the trustees of the will of *H. E. Jones* made some payments of income direct to Mrs. *Barnard,* but to this she was entitled whether the settlement was binding upon her or not. She had done nothing to confirm the settlement.

The Plaintiff in this action was *Agatine Louise Farrington.*

The Defendants were *William Vassall Birkley-Forrester* and *Beatrice Mary* his wife; *William Haywood Dawson* and *Edith Mary* his wife; and *Fortunato Parlato.*

The Plaintiff claimed inquiries as to the properties devised by the will of *Edward Jones* and the persons interested therein; and that all those properties in which the Plaintiff was interested might be sold and the proceeds divided among the persons interested therein, according to their rights and interests; and also administration of the personal estate of *Mary Emma Jones.*

The questions for argument were:—

(1.) Whether *Harriett Barnard* was entitled to repudiate the settlement made upon her marriage?

(2.) Whether, as between the moiety which *Henry Edgar Jones* sold to *Mary Ann Jones* and his other moiety, the latter ought to bear the whole of the mortgage debt of £1500?

(3.) Whether the £900 expended by *Mary Ann Jones* for the rebuilding of the premises occupied by *Dicksons, Limited,* ought to be borne rateably by the owners of both moieties.

Cozens-Hardy, Q.C., and *Lyttelton Chubb,* for the Plaintiff.

Everitt, Q.C., and *L. F. Potts,* for Mrs. *Barnard*:—

Mrs. *Barnard* is entitled now to repudiate the settlement which, being for her benefit, was voidable at her election. Under the circumstances the time which has elapsed is not unreasonable. She has done nothing to confirm the settlement; she was entitled to the income which has been paid to her, whether she claimed under or against the settlement. The action relates only to real estate, and therefore no question of domicil can arise.

Godefroi, for Mrs. *Barnard's* daughters:—

This attempt to repudiate the settlement is not made within a reasonable time: *Carter* v. *Silber* (1). It is nearly forty years since the settlement was executed; it refers to the will, and Mrs. *Barnard* must have known of the will when she executed the settlement.

[NORTH, J., referred to *Seaton* v. *Seaton* (2).]

In that case the settlement was void, not merely voidable.

(1) [1892] 2 Ch. 278. (2) 13 App. Cas. 61.

NORTH J.
1893
In re JONES.
FARRINGTON *v.* FORRESTER

The repudiation ought to take place within a reasonable time after the infant has attained twenty-one: *Zouch* v. *Parsons* (1).

The circumstance that the settlement includes a reversionary interest should not be taken into account in determining whether the repudiation is within a reasonable time. Mrs. *Barnard's* daughters might on their marriages have executed settlements of their interests under their mother's settlement.

Davenport; J. G. Wood; and *Brinton;* for other parties.

March 11. NORTH, J.:—

In my opinion Mrs. *Barnard* is entitled to avoid the settlement, and I understand that she by her counsel now elects to do so. The settlement was made in 1857, when she was of the age of about eighteen; it refers to the will of *Henry Edgar Jones*, and she must have known something about it at that time, but there is no evidence that, from that time until quite recently, she ever heard or knew anything about the settlement or the will, or what her reversionary interest under it was or might be. At any rate, it is quite clear that she never received a single penny under the will until last year, when the trustees of the will, having income in their hands for division, by reason of the death of the surviving tenant for life, seem to have remitted something to her. To that she clearly was entitled. If the settlement was not binding upon her, she was entitled to it in her own right, she having at that time the rights of an unmarried woman. If, on the other hand, the settlement was binding on her, still she would be entitled to receive the income through the trustees. But there were no trustees of the settlement, and the income was not sent to her through trustees of it. It was apparently sent to her in her own right, that is, independently of the settlement. I cannot see, therefore, that she has from first to last done anything to recognise or adopt or confirm the settlement. It was executed by her when she was an infant. It therefore was not void, but voidable at her option after she should attain twenty-one, and that option she must exercise

(1) 3 Burr. 1794.

within a reasonable time. What is a "reasonable time"? I think it is not an unreasonable time if she elects to repudiate the settlement when for the first time the question arises whether anything is or is not to be received by her or her trustees under it, and that question never arose, so far as I can see, until after the death of the tenant for life in 1890. No one has suggested that anything has been done by her since then which can disentitle her to avoid the settlement, if she was entitled to avoid it down to the year 1890. In my opinion it is not unreasonable that she should wait to express her opinion upon the settlement until some money is to be dealt with under it, until something is to be received either by her under it or to be handed over to the trustees of the settlement. At that time she comes forward and says that she elects not to be bound by it, and, in my opinion, she has done this within a reasonable time. In *Carter* v. *Silber* (1) the lapse of more than four years was held unreasonable; but, as I read the judgments, the time had nothing to do with the decision, which depended upon what had taken place in the interval, and the case was decided with reference to its particular circumstances. There was a settlement under which, from the time he attained twenty-one, a son had been receiving in the father's lifetime £1500 a year. The father, who was the settlor of the £1500, died several years after the son attained twenty-one, having presumably made his arrangements upon the footing of the settlement, and all that was decided was, that a person who seeks to avoid a settlement made during his infancy must do so within a reasonable time after he attains full age, and that, having regard to the particular circumstances of that case, more than a reasonable time had elapsed. I do not find that the Court attempted to define what a reasonable time is, nor do I see how any general rule could be laid down as to what is a reasonable time. A time which might be much more than reasonable in one case, might be quite reasonable in another. I decide the present case simply with regard to the existing facts, and, in my opinion, Mrs. *Barnard* has not allowed an unreasonable time to elapse before electing to avoid the settlement.

(1) [1892] 2 Ch. 278.

NORTH, J
1893
In re JONES
FARRINGTON *v.* FORRESTER

March 11. *Cozens-Hardy*, Q.C., and *Lyttelton Chubb*, for persons interested in *Henry Edgar Jones'* contingent moiety:—

The covenant for further assurance contained in the conveyance by *Henry Edgar Jones* of his contingent moiety to his mother, entitled her, under the circumstances, to require him to discharge the mortgage debt, or, in other words, to throw that debt upon the absolute moiety in relief of the contingent moiety.

Brinton, for other persons in the same interest:—

A covenant for further assurance is as effectual as a covenant against incumbrances, when the deed contains no reference to any prior incumbrance: *King* v. *Jones* (1); *Averall* v. *Wade* (2); *Gill* v. *Lyon* (3); *Stock* v. *Aylward* (4); *Clowes* v. *Dickenson* (5).

J. G. Wood, for other persons in the same interest.

Everitt, Q.C., and *L. F. Potts*, for persons interested in the absolute moiety:—

A covenant for further assurance is a very different thing from a covenant against incumbrances. *Ker* v. *Ker* (6) is an authority in our favour.

[NORTH, J.:—In that case the conveyance was a voluntary one.]

Davenport, for persons in the same interest.

Brinton, in reply.

March 18. NORTH, J. I have looked at the cases which were cited in argument. [His Lordship stated the facts, and continued:—]

The question is whether the £1500 which is charged on both moieties of the property ought, as between the owners of the two moieties, to be treated as a charge upon the absolute moiety only. In my opinion it should be so treated. The conveyance of the contingent moiety to the mother contained, not a covenant

(1) 5 Taunt. 418, 427.
(2) Ll. & G. (temp. Sugd.) 252.
(3) 1 John. (N. Y.) Ch. 447.
(4) 8 Ir. Ch. Rep. 429.
(5) 5 John. (N. Y.) Ch. 235.
(6) I. R. 4 Eq. 15.

against incumbrances, but a covenant for further assurance, and, it being a conveyance for value, in my opinion the grantee was by reason of that covenant entitled to call upon the grantor to pay off the charge.

The first case I will refer to is *King* v. *Jones* (1). In that case, so far as I can discover from an examination of the report, there was no covenant against incumbrances; if there had been, I think it would have been stated. There was a covenant for further assurance, with respect to which Mr. Justice *Heath* said (2): "Under this covenant the heir might call for further assurances, even to levy a fine: he certainly might have called for the removal of a judgment, or other incumbrances." That passage has been several times cited in subsequent cases, and it was followed in *Stock* v. *Aylward* (3), in which Lord Chancellor *Brady* said (4): "Now if, under a covenant for further assurance, a purchaser may, as a matter of course, require the removal of a judgment or other incumbrance, it would seem to me that, under this covenant, *John Michael* the elder would be bound to exonerate from his own debt, secured by the judgment of 1802, the estates of those taking in remainder under this settlement," and he referred to a passage in the 13th edition of *Sugden's* Vendors and Purchasers. In the 14th edition (5) the passage is: "Under a covenant for further assurance a purchaser may, of course, require the removal of a judgment or other incumbrances," and as an authority for that the learned author cites *King* v. *Jones*, and also *Stock* v. *Aylward*, which had been decided since the 13th edition of his work.

Again, *Averall* v. *Wade* (6) seems to me an authority to the same effect. In giving judgment, Lord Chancellor *Sugden* dealt with two questions: (1.) whether a judgment creditor of a settlor, by a judgment obtained after the settlement, was entitled to throw the whole of a prior incumbrance, which affected both settled and unsettled estates, upon the settled estate; and (2.) whether he was entitled to contribution out of the settled estate. The settlement contained a covenant by the settlor against

(1) 5 Taunt. 418.
(2) Ibid. 427.
(3) 8 Ir. Ch. Rep. 429.
(4) 8 Ir. Ch. Rep. 435.
(5) Page 613.
(6) Ll. & G. (temp. Sugd.) 252.

NORTH, J.
1893
In re JONES.
FARRINGTON *v.* FORRESTER.

incumbrances. As to the first point, the Lord Chancellor held that the judgment creditor had no such equity. And as to the second point, the Lord Chancellor said (1): "Whether he is entitled to a contribution against it" (that is, the settled estate) "is involved in the consideration of the question raised by the persons claiming under the settlement, which is directly the converse of the former, and depends upon a different principle. They contend that the unsettled estate is to bear both the judgments, and that the second creditor is entitled to no relief against the settled estate. Suppose there was no covenant in the settlement: a man seised of estates *A.* and *B.*, both subject to a judgment debt, settles *A.* for valuable consideration, without noticing the judgment, the judgment creditor would be compelled to go against estate *B.*, and the persons claiming under the settlement would be entitled to have the settled estate exonerated, at the expense of the unsettled estate; the judgment binds both, and where there is a settlement of part of an estate, as if free from incumbrance, equity will throw the whole on the unsettled part, which still belongs to the original owner. Here there is a covenant that the estate is free from incumbrances; assuming that there was no such covenant, but a mere declaration that the estate was free from incumbrances, there can be no doubt that that declaration would throw the incumbrances on the unsettled estates. I cannot put the point on lower grounds, but I can put it on much higher. The covenant is enforced, not by giving damages, because this Court does not give damages, but according to the peculiar jurisdiction of this Court, by specifically doing that which ought to be done." I need not read any further. The Lord Chancellor refers to "a mere declaration that the estate was free from incumbrances." In the present case there is no such a declaration, but there is, as it seems to me, that which is at least equivalent to it in the covenant for further assurance, under which, according to the authorities which I have quoted, the grantee of the estate would be entitled to call upon the grantor to clear off the incumbrance. Such a covenant, therefore, is quite as effectual as a declaration that the estate is free from incumbrances.

(1) Ll. & G. (temp. Sugd.) 259.

But it is said that *Ker* v. *Ker* (1) is a decision the other way. No doubt it is, but for this reason. In that case the Irish Court of Appeal was dealing, not with a conveyance for value as in the present case, but with a voluntary conveyance, and they decided that in such a case the grantee had no such right to be relieved from the charge, because the conveyance was voluntary and not for value. The judgment of Lord Chancellor *O'Hagan* (2) shews that that was the ground of his decision. He says (3): "It might have been otherwise if *Stopford* had been a purchaser for value. It would, certainly, have been otherwise if he had obtained a covenant against incumbrances. In that case he would have been entitled to indemnity for contribution from the grantor, or from his devisees, if the incumbrances, or any portion of them, had been levied from *Lisalea*. But, as the matter was, having given no valuable consideration, and obtaining no protective covenant, could he have asked such contribution against the grantor, if such a levy had taken place soon after the execution of the deed? I think he could not. The grantor would have been entitled to say, 'By my voluntary gift I placed you in my position *quoad* the subject of it; but I did no more. I gave you the benefit subject to the burthen; and, accepting the land, you became liable to the incumbrances.' We must take the deed as we find it; and, if the want of a covenant against them affects the grantee injuriously, this Court cannot supply the defect, because of its voluntary character." Then the Lord Chancellor referred to *Ward* v. *Audland* (4) and *Clavering* v. *Clavering* (5), and continued: "No authority has been produced to establish that a voluntary conveyance, without a covenant against incumbrances, vests anything in the grantee save the estate which the grantor had with all its incidents. *Averall* v. *Wade* (6) was a case in which there was valuable consideration and a covenant against incumbrances;" and that is observed upon in *Handcock* v. *Handcock* (7). Then the Lord Chancellor said (8): "Then, is

(1) I. R. 4 Eq. 15.
(2) Ibid. 20.
(3) Ibid. 21.
(4) 8 Beav. 201.
(5) 2 Vern. 473.
(6) Ll. & G. (temp. Sugd.) 252.
(7) 1 Ir. Ch. Rep. 444, 474.
(8) I. R. 4 Eq. 23.

NORTH, J.
1893
In re JONES.
FARRINGTON *v.* FORRESTER.

the covenant for further assurance sufficient to entitle the grantee in the deed of 1846 to freedom from the liability which would have attached to him if that covenant had been omitted? In other words, is it equivalent to a covenant against incumbrances, or such protective covenants as were enforced in *Hales* v. *Cox* (1)?" Then he referred to the words of the covenant, and cited *King* v. *Jones* (2) and *Stock* v. *Aylward* (3); and he added (4), "looking to them, and considering that in *King* v. *Jones* there was not a voluntary deed, but a deed for value, which may or may not have contained a covenant against incumbrances, but, being for value, probably did contain such a covenant, and at all events imported a right to protection not implied in a voluntary conveyance, and seeing that upon that case the subsequent *dicta* have been founded, I think it is not too much to take them in connection with the special circumstances to which they had reference, and refuse to extend their operation to a deed without value. We are asked, in effect, to import into it a covenant against incumbrances, which may have been deliberately omitted by the grantor; and we cannot, as I have said already, exert the powers of this Court to supply imperfections in a voluntary instrument. The existence of a valuable consideration gives ground for the assumption that the parties to a conveyance meant to guard the purchaser against incumbrances; but are we at liberty to make such an assumption where there has been no such consideration, and where the grantor must be held to have given only what, according to the reasonable construction of his deed, he intended, of his bounty, to bestow on the grantee?" That is a clear and full discussion of the subject, indicating the principles upon which the decisions are based, and pointing out that there is a reason for saying in the case of a conveyance for value that a covenant for further assurance does import relief from incumbrances, but that that cannot be inferred in the case of a merely voluntary conveyance.

Those authorities appear to me to be precisely in point, and, inasmuch as in the present case *H. E. Jones* did not part with his absolute moiety for value (in which case a right of contribu-

(1) 32 Beav. 118.
(2) 5 Taunt. 418.
(3) 8 Ir. Ch. Rep. 429.
(4) I. R. 4 Eq. 24.

tion might possibly have arisen), but disposed of it by his will (of course without consideration), it seems to me that the burthen of the mortgage debt must be borne by the absolute moiety in relief of the contingent moiety. As between the two moieties, the contingent moiety ought to be indemnified against the mortgage debt out of the other moiety.

March 18, 22. *Cozens-Hardy*, Q.C., and *Lyttelton Chubb*, for persons interested in *Mary Ann Jones*' moiety:—

In an action for partition, a tenant in common who has expended money in permanently improving the property is entitled to an allowance in respect of what he has so expended. The owners of the other moiety ought to pay a moiety of the addition to the value of the property by reason of the expenditure: *Leigh* v. *Dickeson* (1); *Parker* v. *Trigg* (2); *Watson* v. *Gass* (3).

Kay v. *Johnston* (4) is not really in point. The only authority to the contrary is a note in *Seton* on Decrees (5) on *Teasdale* v. *Sanderson* (6), to the effect that "an allowance for repairs will not be made unless an occupation rent be charged;" but that case does not bear out the note.

Brinton, for persons in the same interest.

Everitt, Q.C., and *L. F. Potts*, for persons interested in the other moiety:—

The cases cited do not apply to a case like the present, in which the person who expends the money is tenant for life of the whole property. *Mary Ann Jones* must be taken to have expended the money in her character of tenant for life. Moreover, an allowance in respect of an expenditure in improvements by one tenant in common is made only when that tenant in common is charged with an occupation rent: *Teasdale* v. *Sanderson*. One tenant in common cannot be permitted to improve another out of his property.

Davenport, for another person in the same interest.

(1) 15 Q. B. D. 60.
(2) W. N. (1874) 27.
(3) W. N. (1881) 167.
(4) 21 Beav. 536.
(5) 5th Ed. vol. ii. p. 1557.
(6) 33 Beav. 534.

NORTH, J.

1893

In re JONES. FARRINGTON *v.* FORRESTER.

NORTH, J:—

In my opinion, the amount expended in improvements (to the extent which I will mention presently) must be allowed out of the proceeds of the whole property.

The property has now to be sold, and the £900 must be borne by the whole property, and not by either moiety exclusively. At the time when the money was expended, *Mary Ann Jones* was entitled during her life to the whole property, being also tenant in fee of one moiety; *Mary Emma Jones* was tenant for life in remainder of the other moiety; and the expenditure was made with her concurrence, and she joined in the security which was given. That seems to me to shew that they were acting together in the matter, and that what they both agreed to was done for the benefit of the estate. They both joined in the security, but the charge was created in fact upon *Mary Ann Jones*' incumbrance only, and it is now said that she ought to bear the whole amount. It seems to me very unfair that an expenditure, in which both of the persons who were immediately interested in the estate concurred, should all be borne by one of them only. And it is quite clear that that was not the original intention, because, if *Mary Ann Jones* was to pay the whole, there would have been no necessity for consulting the persons who were interested in the other moiety. I have no doubt that the intention was that the £900 should be a charge upon the whole estate. *Mary Ann Jones* and *Mary Emma Jones* are both dead, the tenancy for life in remainder of the latter has come to an end; and we have now to deal with the persons who are entitled in remainder to the moiety which did not belong to *Mary Ann Jones,* except for her life. The statement of facts shews that the property was very largely improved by the expenditure which was made, and that, by means of the expenditure of £900, a large additional expenditure by the company was secured for the benefit of the estate. More than twenty years have elapsed since that was done, and the benefit of the expenditure has no doubt to some extent been worked out; but I am satisfied that, out of an expenditure of something like twice £900, a substantial benefit still remains. The Court is now proceeding to effect a partition of the property by selling it and dividing the

proceeds, and it is suggested that the expenditure, which was not incurred by *Mary Ann Jones* alone, but by her and *Mary Emma Jones* in consultation, should be borne by *Mary Ann Jones'* share alone. It is said that there is a rule of law to that effect. In my opinion there is, at any rate, no such rule of equity, and I do not think the cases give any colour to it.

The case relied upon by Mr. *Everitt* is *Teasdale* v. *Sanderson* (1); but I do not think it bears out the proposition for which he cites it. The report states that, "The suit was instituted by one of several tenants in common, against the others, for a partition of the estate and for an account of the rents and profits received by" (not the defendant but) "the defendants, who had been in exclusive possession for about fourteen years. One of the defendants was in personal occupation of part of the premises" (so there were other defendants, no doubt, in possession of the other parts), "and had, as he alleged, expended a sum of £60 in necessary repairs and improvements of the property." The report is certainly very short. By "the property" I do not understand to be meant the property of which he had been in occupation, but the property which was the subject of the partition, and I think that the last words of the judgment of the Master of the Rolls shew that that was so. Then the defendant "resisted being charged with an occupation rent for the part occupied by him, for in *Griffies* v. *Griffies* (2) it was held, that where one of the tenants in common is in occupation of the estate, he cannot be made liable for rent or waste. He asked, at all events, to be allowed for the repairs and lasting improvements on the part of the property not occupied by him." So that, I take it, he had spent £60 on repairs—part on that portion of the property which he occupied and part on that which he did not occupy, and, if he could not have the expenditure allowed on the part which he occupied, he asked at least to have his expenditure allowed on that part of which he had not been in occupation. Then Sir *J. Romilly*, M.R., said: "I think that these accounts" (that is, of the rents and profits on the one hand, and the allowances on the other) "must be reciprocal, and, unless the defendant is charged with an occupation rent, he is not entitled

(1) 33 Beav. 534. (2) 8 L. T. (N.S.) 758.

NORTH, J.
1893
In re JONES.
FARRINGTON *v.* FORRESTER.

to any account of substantial repairs and lasting improvements on any part of the property." That seems to me to shew that he was not to be allowed to have the equitable assistance of the Court to get any part of his expenditure repaid, unless he was willing to be charged with what he could not by the rules of law, as distinguished from equity, be made liable for. It was merely a case of imposing terms: a man who comes into equity must do equity; but I do not read it as being a decision that you could only have an allowance for repairs where there has been an occupation rent. In fact, so far as he got the allowance for repairs for what he was not in occupation of, it was not against occupation rent.

Then there are those later cases. First of all, there are Lord Justice *Cotton's* observations in *Leigh* v. *Dickeson* (1). I quite agree that that is not a decision—it is an *obiter dictum*; but it is one of great authority, and one which I am the more disposed to accept fully, because it is in entire accordance with what my view of the practice has been, so far as my own experience goes. He is speaking now of proceedings at law. He says (2): "No remedy exists for money expended in repairs by one tenant in common, so long as the property is enjoyed in common" (that might apply in equity also); "but in a suit for partition it is usual to have an inquiry as to those expenses of which nothing could be recovered so long as the parties enjoyed their property in common; when it is desired to put an end to that state of things, it is then necessary to consider what has been expended on improvements or repairs: the property held in common has been increased in value by the improvements and repairs; and, whether the property is divided or sold by the decree of the Court, one party cannot take the increase in value without making an allowance for what has been expended in order to obtain that increased value; in fact, the execution of the repairs and improvements is adopted and sanctioned by accepting the increased value. There is, therefore, a mode by which money expended by one tenant in common for repairs can be recovered, but the procedure is confined to suits for partition."

I think that the other two cases cited from the *Weekly Notes*

(1) 15 Q. B. D. 60. (2) 15 Q. B. D. 67.

entirely bear out the same view, and, in my opinion, the owners of *Mary Ann Jones'* moiety and the charge are entitled to an inquiry to what extent the present value of the property has been increased by the expenditure made in 1870. It may turn out that the present value of the increase is £1200, and in that case the charge cannot be for more than £900. It may be that the present value of the increase is less than that—*e.g.*, only £600—and in that case only £600 can be allowed out of the proceeds of sale, and the difference would have to be borne by the owners of the charge. In my opinion, the owners of *Mary Ann Jones'* moiety and the charge of £1500 are entitled to receive out of the proceeds of the sale of the property a sum (not exceeding £900) equivalent to the increase in the present actual value of the property caused by the expenditure in 1870.

Solicitors: *Thorneycroft & Willis; Philpot & Son; Chester & Co.; Faithfull & Owen.*

W. L. C.

NORTH, J.
1893
April 12

In re AMES.
AMES *v.* AMES.

[1892 A. 1697.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), ss. 37, 51—*Sale of Heirlooms—Fitter on Power of Sale under Act.*

There is no jurisdiction *ex post facto* to sanction the sale of heirlooms. Where heirlooms had been sold to advantage without an order, the Court directed the trustees not to take steps to recover them.

Personal estate was bequeathed on trust to apply the income in keeping up a sea-wall and ornamental grounds on settled real estate and on trust to pay the balance of the income to the tenant for life of the real estate during lives in being and twenty-one years, with a proviso that, if the tenant for life should become disentitled to the possession or income of the real estate, the settled personal estate should sink into the residue:—

Held, that this proviso was void under sect. 51 of the *Settled Land Act*, 1882, and that the tenant for life who had sold the real estate was still entitled to the income of the personal estate.

THIS was an originating summons to determine certain questions arising under the will of *William Ames*, deceased.

NORTH, J.
1893
In re AMES.
AMES *v.* AMES

The testator by his will dated November, 1852, devised his mansion-house called *Clevelands* and his other hereditaments in the county of *Devon* unto and to the use of his nephew *Richard Llewellyn*, his nephew *Lionel Ames*, and his nephew *Henry Metcalf Ames*, on trust for his brother *George Henry Ames* during his life, and from and after his decease upon trust for his nephew *Edward Levi Ames* for life, and after his death upon trust for such son of *Edward Levi Ames* as he should select and who should attain twenty-one, and the heirs male of the body of such son; and, subject to such trust, for the first and other sons of *Edward Levi Ames* successively in tail male, and in default of such issue upon similar trusts for the testator's nephew *Henry St. Vincent Ames* and his sons, with remainders over on similar trusts for other nephews of the testator and their sons.

The testator bequeathed "the pictures, books, plate, china, glass, household goods and furniture of every kind, as well useful as ornamental, and wines unto the said *Richard Llewellyn*, *Lionel Ames* and *Henry Metcalf Ames*, their executors, administrators, and assigns, in trust to permit the same to go along with and be used and enjoyed at my mansion-house called *Clevelands*, so far as the rules of law and equity will permit, by the person or persons who, by virtue of this my will, shall for the time being be in the actual possession or entitled to the receipt of the rents and profits of the said hereditaments and premises hereinbefore devised; yet so that the same shall not vest absolutely in any son of a tenant for life under this my will, unless such son shall attain the age of twenty-one years, or die under that age bearing issue inheritable under his estate tail, but on the decease of any such son being tenant in tail male by purchase by virtue of this my will under the age of twenty-one years without leaving such issue as aforesaid, shall go in the same manner as if they had been freehold of inheritance and had been included in the devise in strict settlement hereinbefore contained."

The testator made a codicil to his will dated May, 1859, by which he revoked the trust declared of *Devonshire* real estate in favour of his brother *George Henry Ames* for his life, and declared that the several trusts in remainder should be accelerated. The codicil contained the following recitals and bequest: "And

whereas I am desirous of providing a fund of which the income shall be applied in maintaining in good and efficient repair the wall in the undercliff built on the north side of the public foot-path, and extending from *Ware Common*, on the east, to *Whitlands*, on the west, and which wall is subject to frequent dilapidations from the nature of the ground, and I am also desirous that such income should, without prejudice to the maintaining of the said wall in good and efficient repair (which I declare to be the primary object of the intended proviso), be applied further in preserving in proper order and condition the walks and drives through or over, and the plantations, woods, and ornamental shrubberies upon my estate, or on any part of my estate called *Pinney*. Now, therefore, I bequeath unto my said trustees *Richard Llewellyn Lionel Ames* and *Henry Metcalf Ames*, their executors, administrators and assigns, the further sum of £4000 £3 per cent. Consolidated Bank Annuities, free of legacy duty, to be transferred into or purchased in their names at the expense of my personal estate as soon as conveniently may be after my decease. And I direct that my said trustees and the survivors and survivor of them, and the executors and administrators of such survivor shall stand possessed of the said sum of £4000 Consolidated Bank Annuities and of the dividends thereof upon the trusts following (that is to say) upon trust during the lives of my said nephews *Edward Levi Ames*, *Henry St. Vincent Ames*, *Frederick Ames*, *Alfred Ames*, *Reginald Ames*, *George Acland Ames*, and *Charles Herbert Ames*, and of the several sons who may be living at my death of my seven last-mentioned nephews, and during the lives and life of the survivors and survivor of them, and during the term of twenty-one years to be computed from the death of such survivor to apply the dividends of the said sum of £4000 Consolidated Bank Annuities in or towards maintaining and keeping in good efficient and substantial repair the said wall, and subject thereto in preserving in good repair, order, and condition the said walks, drives, plantations, orchards, woods and ornamental shrubberies. And if in any year during the continuance of the aforesaid trust (which trust I declare shall be deemed to commence from the period of my death), there shall be any surplus dividends unapplied to the purposes aforesaid or

NORTH, J.
1893
In re AMES.
AMES *v.* AMES.

any of them, such surplus dividends shall at the expiration of every such year be paid to the person who under or by virtue of the trusts and provisions of my said will and this or any other codicil or codicils thereto shall for the time being be entitled to the possession or to the receipt of the rents and profits of the said mansion-house and hereditaments so devised as aforesaid by my said will to be retained by such person for his own absolute use and benefit, or if such person shall be under age then the same shall be paid to his guardians or guardian for the use and benefit of such person. And from and after the death of the survivor of the before-named lives and the expiration of the said term of twenty-one years, I direct that the said sum of £4000 Consolidated Bank Annuities shall be held upon trust for the person who at the expiration of the said term shall be entitled by virtue of my said will and this or any other codicil or codicils thereto to the possession or to the receipt of the rents and profits of the said mansion-house and hereditaments by my said will devised as aforesaid and for the executors and administrators of such person for his and their own absolute use and benefit.

"Provided always, and I do hereby declare, that if at any time during the continuance of the aforesaid trusts of the said sum of £4000 Consolidated Bank Annuities, the person for the time being entitled by virtue of my said will, or this or any other codicil or codicils thereto, to the possession or to the receipt of the rents and profits of the said mansion-house and hereditaments and to the hereditaments to be so purchased as hereinbefore directed or to . . . . shall by alienation or other act of his (other than a lease by such person in exercise of the power of leasing hereinbefore contained) cease to be entitled to such possession or receipt, or in case any person who shall be entitled by virtue of my said will and this or any other codicil or codicils thereto to the said mansion and hereditaments so devised as aforesaid and to the hereditaments hereinbefore directed to be purchased, or to . . . . shall alone or with the consent of the protector for the time being of the settlement, made as aforesaid by my said will and this or any other codicil or codicils thereto, bar his estate in tail male alone, or his estate in tail male, and the several estates thereby limited to take effect in remainder or reversion

expectant on his estate in tail male, and shall not within such time not exceeding six calendar months, as the trustees or trustee for the time being of my said will shall deem reasonable, resettle to the satisfaction of the same trustees or trustee the said mansion-house and hereditaments respectively so devised and directed to be purchased as aforesaid, and the said Bank Annuities on the same principle (or as near as may be), of which the said trustees or trustee shall be the sole judges or sole judge as the same is settled by my said will, and this or any other codicil or codicils thereto and (so far as may be of which the said trustees or trustee shall also be the sole judges or sole judge) in favour of the same objects or of their respective issue male or some of them, then and in either of such cases the trusts hereinbefore declared concerning the said sum of £4000 Consolidated Bank Annuities and the dividends thereof shall cease and determine, and thenceforth the same shall fall into and be deemed part of my residuary personal estate, and be held upon, under, and subject to the same trusts and provisions as are by my said will, and this or any other codicil or codicils thereto declared, of my said residuary personal estate, or as near thereto as the deaths of parties and other intervening circumstances will permit."

The testator died in November, 1877.

Henry St. Vincent Ames, the Plaintiff in this summons, became on the 7th of January, 1892, the tenant for life under the testator's will of the *Cleveland* estates. The present trustees of the will were the Plaintiff and *William Herbert Ames* and *Frederick Ames*, who were Defendants to the summons. By an order dated the 12th of March, 1892, the Defendant, *William Herbert Ames*, and *Henry Tudway Coney*, also a Defendant to the summons, were appointed trustees under the settlement made by the testator's will for the purposes of the *Settled Land Act*. *Alfred Ames*, one of the testator's residuary legatees, was a Defendant to the summons.

By indentures dated respectively the 14th and 16th of June, 1892, the first tenant in tail male *in esse* (with the consent of *Henry St. Vincent Ames* as protector of the settlement) barred his estate tail and remainders and resettled the estate.

The Plaintiff as tenant for life, with the consent of the trustees

NORTH, J.
1893
In re AMES.
AMES *v.* AMES

under the *Settled Land Act*, sold and (by indentures dated the 11th of October, 1892) conveyed the testator's settled estates as to part to *Wilton Alhusen*, and as to other part to Sir *Henry Peek*.

The Plaintiff sold a portion of the chattels settled as heirlooms to *Wilton Alhusen*, the purchaser of the *Manor House* at *Clevelands*, for £211 12*s*. He had sold other portions of the heirlooms for £132 17*s*. 9*d*. A portion was still unsold of the value of not more than £100. There was evidence that the full value had been obtained for the heirlooms already sold, and that the heirlooms were of no great family interest.

The summons asked (1.) that the sale of heirlooms already made by the Plaintiff might be sanctioned, and that he might be authorized to sell the remaining chattels subject to the settlement; (2.) that the rights of persons interested in the legacy of £4000 given by the testator's codicil might be ascertained.

Cozens-Hardy, Q.C., and *Vernon R. Smith*, for the Plaintiff:—

It was proper that the heirlooms should be sold. We ask that the sale already made should be sanctioned, and authority given to the Plaintiff to sell the chattels still unsold.

NORTH, J.:—The Act does not provide for the authority of the Court being given *ex post facto*. I can protect the trustees in this way; I will allow the summons to be amended by making it ask whether the trustees ought to take any proceedings to recover the heirlooms that have been sold, and I will answer the question in the negative.

Cozens-Hardy, Q.C., and *Vernon R. Smith*, for the Plaintiff:—

The gift over of the Consols in case the tenant for life ceases to be entitled to the possession or rents of the estate, if it could take effect, would deprive the tenant for life of an advantage he previously had, and therefore is a provision tending to induce him not to exercise his power to sell under the *Settled Land Act*: *In re Paget's Settled Estates* (1).

Everitt, Q.C., and *Stewart-Smith*, for a residuary legatee:—

The question whether the gift over of this settled sum of

(1) 30 Ch. D. 161.

Consols is a provision calculated to operate on the mind of the tenant for life in preventing him from selling, is a question to be determined by the particular circumstances; in this case the nature of the trust as a whole is such that it would not have such effect.

Cozens-Hardy, in reply.

NORTH, J.:—

There may be some difficulty in saying who will take under the ultimate gift after the expiration of the trust; but under the words of the trust the Plaintiff as tenant for life is also entitled to have the income of the fund applied in keeping up the sea-wall, and what I may call the amenities of the property, so that to that extent if the property were retained he would be entitled to have expended upon it that which would produce to him an increase in the value of a property the enjoyment of which he has. If he parts with the property he cannot have the same benefit.

After declaring the trusts of the £4000, the codicil provides that if at any time during the continuance of the trusts of the £4000, the person entitled to possession or receipt of the rents and profits of the settled property shall by alienation or other act of his cease to be entitled to such possession or receipts, or in case of a tenant in tail disentailing and not resettling the settled property: "In either of such cases the trusts declared concerning the £4000 and the dividends thereof shall cease and determine, and thenceforth the same shall fall into his residue." That is to say, if the present tenant for life had refrained from selling, he would have been in enjoyment of the estate with a yearly expenditure upon it, in relief of the expenditure he would otherwise have been put to himself. That is, so long as he was in the possession, he would have had the benefit of the income of the £4000 Consols. The capital of that sum would not, of course, go into his own pocket. But there is an estate which, while the tenant for life remains in possession, will have a sum of money spent on it yearly; but when he parts with it the expenditure ceases. That certainly seems to me to come within sect. 51 of the *Settled Land Act*, which provides for the case

NORTH, J.
1893
In re AMES.
AMES *v.* AMES.

of a disposition of personal property being made, the effect of which is to tend to have the operation of making the tenant for life abstain from exercising the power of sale given him by the Act; a disposition which the section intends shall not have any legal effect.

I think that, notwithstanding the sale, the Plaintiff is entitled still to have the income of the fund.

Solicitors for Plaintiff and trustees: *Burch, Whitehead & Davidsons.*

Solicitors for residuary legatee: *Guscotte, Wadham & Co.*

D. P.

NORTH, J.
1893
April 14.

BRIGHTON MARINE PALACE AND PIER, LIMITED *v.* WOODHOUSE.

[1893 B. 380.]

Practice—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 4—"*Step in the Proceedings*"—*Rules of Supreme Court,* 1883, *Order* LXIV., *r.* 8—*Enlargement of Time by Consent.*

An application by letter, under Order LXIV., rule 8, for extension of time to put in a statement of defence, is not taking a step in the proceedings within the meaning of sect. 4 of the *Arbitration Act,* 1889.

THIS action was brought upon a building contract contained in an agreement between the *Brighton Marine Palace Company, Limited,* the second Plaintiffs on the record, and the Defendant; and a subsidiary agreement of same date, indorsed on the first agreement, made between the Plaintiffs, the *Brighton Marine Palace and Pier, Limited,* and the Defendant, confirmatory of the principal agreement. The principal agreement contained a stipulation for referring matters in dispute to arbitration.

The writ was issued on the 26th of January, 1893. On the 6th of February the Defendant entered an appearance. An *ex parte* interim injunction was obtained by the Plaintiffs on the 16th of February, 1893, restraining the Defendant from removing plant and material. On the 3rd of March the motion for an injunction was ordered to stand over till trial, the Defendant undertaking

not to move the plant or material in the meanwhile. A statement of claim was delivered on the 11th of March, 1893. On the 17th of March the Plaintiffs obtained an order on the Defendant for production of documents. On the 21st of March the Defendant's solicitors wrote to the Plaintiffs' solicitors asking for an extension of time, for putting in a statement of defence, for fourteen days. On the following day the Plaintiffs' solicitors consented in writing to such application. On the 29th of March notice of motion (now made on behalf of the Defendant) was given that, pursuant to the *Arbitration Act*, 1889, s. 4, all proceedings in the action might be stayed. On the 5th of April, 1893, the Defendant's solicitors applied to the Plaintiffs' solicitors for a further extension for ten days of time for putting in a statement of defence. On the following day the Plaintiffs' solicitors consented in writing to such further extension of time.

Byrne, Q.C., and *Baines*, for the Defendant:—

The Defendant has not taken any step in the action, and is therefore entitled, under sect. 4 of the *Arbitration Act*, 1889, to have proceedings in the action stayed, he being ready and willing to refer all questions to arbitration, in accordance with the terms of his contract. That getting time by agreement is not taking a step in the action, within the meaning of the section, has been expressly decided by Mr. Justice *Denman* in *Chappell* v. *North* (1).

Farwell, Q.C., and *Methold*, for the Plaintiffs:—

Mr. Justice *Denman's* observations, on the point now before the Court, in *Chappell* v. *North*, amounted only to a *dictum*. There were other points before the Court—in fact, the decision was that a step had been taken by the plaintiff (who was moving, as defendant to a counter-claim, to stay proceedings) since the counter-claim was put in. Mr. Justice *Wills* did not deal with the point. In the case of *Smith* v. *British Marine Mutual Insurance Association* (2), Mr. Justice *Field* held that obtaining time to put in a statement of defence was taking a step in the action. The

(1) [1891] 2 Q. B. 252. (2) W. N. (1883) 176.

NORTH, J.
1893
BRIGHTON MARINE PALACE AND PIER, LIMITED v. WOODHOUSE.

report does not state how the time was obtained; it was presumably obtained in the simplest way by agreement, without having recourse to a summons.

Assuming that there is power to stay the proceedings, it is a matter of discretion whether that power will be exercised by the Court. After having twice applied for and been given time, the Defendant will not be allowed to have the proceedings stayed. The circumstances are such that an injunction is desirable; that is a reason for not staying the action.

Byrne, in reply.

NORTH, J.:—

In my opinion, I ought to make the order I am asked to make. The application is made under sect. 4 of the *Arbitration Act*, 1889, which provides that, if any party to a submission "commences any legal proceedings in any Court against any other party to the submission . . . in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings." The Defendant has not delivered any statement of defence; therefore, there is no question so far as pleading is concerned: he has not delivered any pleading; but he must apply before taking any other step in the action. The question is whether he has taken any other step in the action. What is relied on as steps taken by the Defendant is, that his solicitors wrote on two occasions asking for further time to put in a defence, which applications were acceded to. In my opinion, asking for time by letter is not taking a step in the action; it is taking a step outside the action altogether. The application was under a rule which provides for enlargement of time without taking any step in the action, the very object of the rule being to enable the parties, without the expense of applying in the action, to enlarge the time. If the other side did not agree to enlarge the time, the party wishing further time would have to take a step in the action. I am of opinion that this is settled by decision, that obtaining time by agreement is not a

step in the action. The case *Chappell* v. *North* (1) seems to be exactly in point, and I do not see why I should not follow it. In that case there was a counter-claim, and the plaintiff had taken out a summons and obtained leave to administer interrogatories after the counter-claim was put in. He had also obtained time to put in a statement of defence to the counter-claim. He moved to stay proceedings in the counter-claim on the ground that there was a submission to arbitration. All these circumstances were relied upon as an answer to the motion. On the point now before me, Mr. Justice *Denman* said (2): "Three different matters were relied on as being such steps. The first was that he had obtained a series of consents from the defendant for the extension of time for the delivery of reply." That seems to me precisely the same case as the present, because, although it relates to a reply by a plaintiff, the plaintiff was proceeding to put in a defence to a counter-claim. Mr. Justice *Denman* continues: "No doubt, if the consent had been refused the plaintiff would have had to take out a summons, and that summons would have been a step. But I do not think that the obtaining a consent, which was asked for for the very purpose of avoiding the necessity of taking a step, can itself be regarded as a step taken." That is exactly in point. It would be disrespectful in me to decline to follow that.

It is said that this decision was upon another point, because the applicant did not succeed, another point being decided against him. There were three points. Mr. Justice *Denman* gave a decision on this point in favour of the applicant.

Mr. *Farwell* relied on a case of *Smith* v. *British Marine Mutual Insurance Association* (3), under the *Common Law Procedure Act.* It is very briefly and curtly reported—so curtly, that it leaves out the exact point before me. There, the defendant had obtained time to put in statement of defence, and had agreed to take short notice of trial. A Master had stayed the action under sect. 11 of the *Common Law Procedure Act*, 1854. The plaintiff appealed. Mr. Justice *Field* held that the objection of the plaintiff to the Master's order was good. Mr. *Farwell* says that

(1) [1891] 2 Q. B. 252. (2) [1891] 2 Q B. 256.
(3) W. N. (1883) 176.

NORTH, J.
1893
BRIGHTON MARINE PALACE AND PIER, LIMITED v. WOODHOUSE.

the probability was that extension of time was obtained by letter. It is equally probable that it was not, and that is important. The report is, therefore, quite consistent with either hypothesis, and does not assist in the least. Again, it is urged by Mr. *Methold*, that it does not follow that the Court will order the proceedings to be stayed, and that the circumstances here are such that the Court will, in the exercise of its discretion, refuse to make the order—that the Defendant, having a second time applied for time, ought not to have the proceedings stayed. At the time the second letter was written, the notice of motion had actually been given, and it cannot, therefore, be said that in giving time the Plaintiffs were under the belief that the Defendant had elected to go on with the action.

Mr. *Methold* also says, that there is sufficient reason not to stay all proceedings because the Plaintiffs may wish to apply for some further injunction. I think it quite right that the order should be made giving liberty to apply; for the arbitrator may think that something is being done that ought not to be done. Subject to that, I think the order should go.

Solicitors for Defendant: *Thomas White & Sons.*
Solicitors for Plaintiffs: *Bolton & Co.*

D. P.

In re BOWEN.
LLOYD PHILLIPS *v.* DAVIS.

[1892 B. 2715.]

STIRLING, J.
1893
March 11, 29.

Remoteness—Gift to Charity in Perpetuity—Gift over to individuals.

The principle established by *Christ's Hospital* v. *Grainger* (1), and *In re Tyler* (2), that the rule against perpetuities has no application to the transfer in a certain event of property from one charity to another does not extend to cases where (1.) an immediate gift in favour of private individuals is followed by an executory gift in favour of charity, or (2.) an immediate gift in favour of charity is followed by an executory gift in favour of private individuals.

The testator, who died in 1847, by his will, dated in 1846, bequeathed two sums of money to trustees upon trust to establish schools in certain parishes, and to continue the same for ever thereafter; and he declared that, if at any time thereafter, the Government should establish a general system of education, the several trusts of the said legacies should cease and determine, and he bequeathed the said sums of money in the same manner as he had bequeathed the residue of his personal estate; and he appointed his three sisters to be his executrixes and residuary legatees:—

Held, that the testator had made an immediate disposition in favour of charity in perpetuity, followed by a gift over of a future interest, to arise upon an event which need not necessarily occur within perpetuity limits; and that the gift over consequently failed.

ADJOURNED SUMMONS.

The Rev. *Daniel Bowen*, of *Wann-I-for*, in the county of *Cardigan*, by his will, dated the 3rd of September, 1846, bequeathed to trustees two sums of £1700 and £500, respectively, upon trust to invest the same, and in the next place to establish in each of certain parishes in *Wales*, a Welsh day-school to be called the "*Wann-I-for Charity School*," and to continue the same schools for ever thereafter; and he declared that "if at any time hereafter the Government of this kingdom shall establish a general system of education, the several trusts of the said several sums of £1700 and £500 shall cease and determine, and I bequeath the said several sums in the same manner as I have bequeathed the residue of my personal estate."

(1) 1 Mac. & G. 460. (2) [1891] 3 Ch. 252.

STIRLING, J.
1893
In re BOWEN. LLOYD PHILLIPS *v.* DAVIS.

The testator appointed his sisters, *Jane Lloyd, Ann Phillips,* and *Rachel Rees,* to be his executrixes and residuary legatees.

The testator died in October 1847, and after his death the two sums of £1700 and £500 were duly applied for the purposes of the charities.

This was an originating summons taken out by the personal representatives of the residuary legatees raising the following questions (1.) whether the Government had by the *Elementary Education Act,* 1870, and the Acts amending it, established a general system of education; (2.) whether the trusts by the will declared of the two sums of £1700 and £500 had ceased and determined; and (3.) whether, if so, those sums had fallen into the residue of the testator's estate. The summons was opposed by the trustees of the charities and the Attorney-General.

Hastings, Q.C., and *Swinfen Eady,* for the summons:—

First, we say that a general system of education has been established by the Government by the *Elementary Education Act,* 1870, and the amending Acts, the last of which was passed in 1890. Secondly, we say that the gift over on failure of the bequest to the charity is not obnoxious to the rule against perpetuities, and that, consequently, we are entitled to the fund.

It was held in *Christ's Hospital* v. *Grainger* (1), that a contingent limitation over of property from one charity to another did not offend against the rule; *à fortiori,* a gift over from a charity to a private individual is not within the rule: *Walsh* v. *Secretary of State for India* (2), and *In re Randell* (3), which latter case is exactly like the present.

Cruickshank, for the trustees of the charity.

Sir *J. Rigby,* S.G., and *Ingle Joyce,* for the Attorney-General:—

The question is whether there can be a gift over to a private individual after a gift to a charity *in perpetuum.* The answer to that is supplied by the case of *London and South-Western*

(1) 1 Mac. & G. 460. (2) 10 H. L. C. 367. (3) 38 Ch. D. 213.

Railway Company v. *Gomm* (1), by which it was decided that no valid interest can be created which does not of necessity vest within the prescribed period of a life or lives in being and twenty-one years after. No doubt an exception has been grafted upon the rule, viz., that where charities are concerned, the mere shifting of a charitable trust from one object to another does not invalidate the bequest, as in *Christ's Hospital* v. *Grainger* (2). Charitable uses are of course perpetuities, and as such are allowed. But that is not this case. *In re Randell* (3) was no doubt rightly decided upon the construction of the will; but there, it was not a gift to a charitable use for ever cut down by a gift over, but it was in effect a gift of a terminable annuity upon the cesser of which the fund was undisposed of and fell into residue. Here, however, the fund is dedicated to charitable uses for ever, and the gift over is only to take effect upon an event which might not occur for 1000 years. Such a gift is obviously too remote. A conditional limitation may be bad for remoteness, although capable of being released or alienated, if the event upon which it is to take effect may occur more than twenty-one years after a life or lives in being: *Gray* on the Rule against Perpetuities (4). In the same treatise (5), it is laid down that a gift to a charity may be followed by a gift to an individual which is too remote under the rule against perpetuities; and the author says that it has never been doubted that in such a case the gift over to the individual is subject to the rule.

Hastings, in reply:—

It cannot make any difference whether the gift is to a charity for ever with a proviso that the interest is to cease upon a certain event, or whether the gift is until the happening of a certain event which may never come to pass.

[STIRLING, J., referred to *Chamberlayne* v. *Brockett* (6).]

It was also argued that the claim of the residuary legatees was barred by the *Statute of Limitations*, but, in the view which the Court took, the arguments on that point are not material.

(1) 20 Ch. D. 562, 581.
(2) 1 Mac. & G. 460.
(3) 38 Ch. D. 213.
(4) Pages 192, 193.
(5) Page 363.
(6) Law Rep. 8 Ch. 206.

STIRLING, J.

1893

In re BOWEN. LLOYD PHILLIPS *v.* DAVIS.

STIRLING, J. (after stating the facts, continued):—

According to the law as stated by Sir *G. Jessel*, M.R., in *London and South-Western Railway Company* v. *Gomm* (1), if the gift in favour of the residuary legatees is one which is not to vest until after the expiration of, or will not necessarily vest within the period fixed and prescribed by law for the creation of future estates and interests, then the gift is bad, unless the circumstance that the prior gift is in favour of a charity makes a difference. It has been decided that the rule against perpetuities has no application to the transfer in a certain event of property from one charity to another—*Christ's Hospital* v. *Grainger* (2), *In re Tyler* (3). The principle of those decisions, however, does not extend, in my opinion, to cases where (1.) an immediate gift in favour of private individuals is followed by an executory gift in favour of charity, or (2.) an immediate gift in favour of charity is followed by an executory gift in favour of private individuals. Of the former class of cases Lord Chancellor *Selborne*, in giving the judgment of the Court of Appeal in *Chamberlayne* v. *Brockett* (4), says: "If the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*." The second class of cases does not seem to have fallen under the consideration of any Court in this country; but the Supreme Court of *Massachusetts* has in *Brattle-square Church* v. *Grant* (5) and *Theological Education Society* v. *Attorney-General* (6) held that the rule against perpetuities applies to them. For the knowledge of these decisions I am indebted to the very learned and able treatise of Professor *J. C. Gray* on the Rule Against Perpetuities (see sect. 593), to which I was referred in argument. On the other hand, as property may be given to a charity in perpetuity, it may be given for any shorter period,

(1) 20 Ch. D. 562, 581.
(2) 1 Mac. & G. 460.
(3) [1891] 3 Ch. 252.
(4) Law Rep. 8 Ch. 211.
(5) 3 Gray, 142.
(6) 21 Lathrop, 285.

however long; and the interest undisposed of, even if it cannot be the subject of a direct executory gift, may be left to devolve as the law prescribes. Of this an example is to be found in *In re Randell* (1), in which the head-note is as follows: "A testatrix bequeathed £14,000 on trust to pay the income to the incumbent of the church at *H.* for the time being so long as he permitted the sittings to be occupied free; in case payment for sittings was ever demanded, she directed the £14,000 to fall into her residue:—*Held*, first, that the testatrix had not expressed a general intention to devote the £14,000 to charitable purposes, so that in case of failure of the trust for the benefit of the incumbent the fund would be applied *cy-près;* secondly, that the direction that the fund should fall into the residue, being a direction that the fund should go as the law would otherwise carry it, did not offend the rule against perpetuities." In giving judgment Mr. Justice *North* said: "On the construction of the will, it is a charity for a particular limited purpose, and nothing beyond that is declared; as soon as that particular purpose comes to an end, the fund which was subjected to that particular trust falls into the residue of the estate; and it would do so just as much if there was no such limitation as this in the will, as it does when the limitation exists. The limitation is that, in that case, 'the trust moneys, and the interest, dividends, and annual income arising therefrom shall fall into and be dealt with as part of my residuary personal estate.' If she had said that it would fall into and form part of her residuary personal estate, she would simply have been saying what the law is; and saying that it shall do so is simply saying what the law would do without such a statement. In my opinion a direction that in a particular event a fund shall go in the way in which the law would make it go in the absence of such a direction, cannot be said to be an invalid gift, or contrary to the policy of the law."

The question which I have to decide, therefore, appears to me to reduce itself to one of the construction of the testator's will —*i.e.*, whether the testator has given the property to charity, in perpetuity, subject to an executory gift in favour of the

(1) 38 Ch. D. 213, 218.

STIRLING, J.
1893
In re BOWEN LLOYD PHILLIPS *v.* DAVIS

residuary legatee, or whether he has given it for a limited period, leaving the undisposed of interest to fall into residue. In construing the will the rule to be applied is that stated by Lord *Selborne* in *Pearks* v. *Moseley* (1): "You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean, that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say, that, if the construction of the words is one about which a Court would have no doubt, though there was no law of remoteness, that construction cannot be altered, or wrested to something different, for the purpose of escaping from the consequences of that law." Now, the sums of £1700 and £500 are bequeathed to trustees who are obviously selected with a view to the efficient administration of the charitable trusts created by the will, and were not intended by the testator to be charged with any duties as regards any other portion of his property. He directs the trustees named in the will, by means of the funds paid over to them by his executors, to establish certain schools, "and to continue the same schools for ever thereafter." He contemplates a perpetual succession of trustees in whom the execution of the trusts is to be vested. I think that on the true construction of the will there is an immediate disposition in favour of charity in perpetuity, and not for any shorter period. That is followed by a gift over if at any time the Government should establish a general system of education; and under that gift over the residuary legatees take a future interest conditional on an event which need not necessarily occur within perpetuity limits. It follows that the gift over is bad; and, consequently, the summons must be dismissed.

Solicitors: *Sharon Grote Turner; Hare & Co.; Helder, Roberts, Son & Walton,* agents for *W. Morgan Griffiths, Carmarthen.*

(1) 5 App. Cas. 714, 719.

G. A. S.

HOWITT *v.* EARL OF HARRINGTON.

STIRLING, J.

1893

April 13, 15, 18.

[1892 H. 3360.]

Statute of Limitations (3 & 4 *Will.* 4, *c.* 27), *ss.* 1, 2, 3—*Copyhold Quit Rent—Non-payment—Extinction—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 1.

A quit rent payable in respect of a copyhold tenement is not, like a rent reserved upon a lease, excepted from the operation of the *Statutes of Limitations* (3 & 4 Will. 4, c. 27, and 37 & 38 Vict. c. 57).

Where, therefore, such a quit rent had remained unpaid for more than twelve years, and no acknowledgment had been given in respect thereof, the right to recover the same was held to be barred by the operation of those statutes.

THE Plaintiff, *Jane Howitt*, was tenant upon the Court Rolls of a piece of land holden of and also parcel of the manor of *Sawley*, in the county of *Derby*, and her co-Plaintiff was the occupier of the said land as yearly tenant under her. The Defendant was the lord of the manor of *Sawley*. The tenement was held subject to the payment of a quit rent, no part of which, however, had been paid since the year 1878, nor had any acknowledgment within the *Statute of Limitations* been given in respect of the same.

In 1892 the Defendant had threatened to distrain upon the tenement to recover the arrears of the quit rent payable in respect of the last six years; and in September, 1892, the Plaintiffs brought this action claiming a declaration that the quit rent had become extinguished by non-payment for a period of more than twelve years, and an injunction to restrain the Defendant from distraining upon the tenement.

By consent the point of law raised by the pleadings was set down for hearing under Order XXV., rule 2 of the *Rules of Supreme Court*, 1883, the question for the determination of the Court being whether the quit rent had become extinguished by the operation of the Act 3 & 4 Will. 4, c. 27, and the *Real Property Limitation Act*, 1874 (1). This was the hearing of the point of law.

(1) Sect. 1 of the Act 3 & 4 Will. 4, c. 27, provides "that the word 'rent' shall extend to all heriots, and to all services and suits for which a distress

STIRLING, J.
1893
HOWITT v. EARL OF HARRINGTON

Beale, Q.C., and *Lawrence Jenkins*, for the Plaintiffs:—

The claim of the Defendant is barred by the *Statutes of Limitations*. Quit rents are rents of assize, and these are of two kinds, *viz.*, chief rents payable in respect of freeholds, and quit rents payable in respect of copyholds. It has been decided that the former are liable to be barred by statute, and we submit that the latter are equally liable: *Owen* v. *De Beauvoir* (1); *Earl of Chichester* v. *Hall* (2).

It is immaterial whether the tenure of the copyholds, in respect of which the quit rents are payable, is at the will of the lord, or by the custom of the manor. All quit rents payable in respect of copyhold tenements are in the same position, with reference to the application of the statute, as chief rents payable in respect of freehold tenements. None of the text-book writers have drawn any distinction between them for that purpose: *Scriven* on Copyholds (3); *Cruise's* Digest (4); *Blackstone's* Commentaries (5); *Bacon's* Abridgment—Copyhold (6).

Quit rents were within the statute 32 Hen. 8, c. 2, under which no length of time within the period of fifty years was a bar to a distress, and this is clear from *Eldridge* v. *Knott* (7), where it was

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may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole)."

Sect. 2 provides "that after the 31st day of December, 1833, no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same."

Sect. 3 contains enactments as to the time when the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued, and it gives certain instances.

By sect. 1 of the *Real Property Limitation Act*, 1874, the period of twenty years, fixed by sect. 2 of the Act 3 & 4 Will. 4, c. 27, was altered to twelve years.

(1) 16 M. & W. 547; 5 Ex. 166.
(2) 17 L. T. (O.S.) 121.
(3) 2nd Ed. vol. i. p. 419.
(4) 4th Ed. tit. 31, ch. ii. pl. 45.
(5) Part III. p. 189.
(6) 7th Ed. vol. ii. p. 238 (M.).
(7) 1 Cowp. 214.

held that as a period of time was prescribed by the statute as requisite for barring a quit rent, mere lapse of time short of the prescribed period was not of itself sufficient ground for the presumption of a release or extinguishment. That case seems to refer to copyhold quit rents.

The report of the Commissioners upon which the *Real Property Limitation Acts* passed in the reign of *William* IV. were founded, shews that copyhold quit rents were intended by the Commissioners to be included within the operation of the statutes. A distinction was drawn by them between ancient rents, which of course include copyhold quit rents, and conventional rents, or rents reserved under leases or agreements, and they suggested that the statute should apply to the former. The suggestion was carried out in 3 & 4 Will. 4, c. 27, s. 2.

The quit rent in this case comes within the words of the Act, being "rent payable out of land," which, by sect. 1, includes copyholds.

It has been held that conventional rents are not within the statute: *Grant* v. *Ellis* (1). So with heriots: *Lord Zouche* v. *Dalbiac* (2). On the other hand all perpetual rents are within its operation: *Irish Land Commission* v. *Grant* (3).

It cannot be said that there is any analogy between copyhold quit rent and rent reserved upon a demise. Disseisin is not necessary to the application of the Act. *Grant* v. *Ellis* was not founded upon that reasoning. The statute applies in cases of mere denial: *Owen* v. *De Beauvoir* (4); *Adnam* v. *Earl of Sandwich* (5); and according to *Coke* upon *Littleton* (6), denial is not disseisin of a rent-service, though it is of a rent-charge. In none of the authorities is any distinction drawn between freehold and copyhold quit rents. So in the more modern text-books: *Scriven* on Copyholds (7); *Elton* on Copyholds (8). On the other hand, there are many points of resemblance between them. The remedy of the lord is the same in each case: *Booth* on Real Actions (9); *Watkins* on Copyholds (10); *North* v. *Earl of*

(1) 9 M. & W. 113, 115.
(2) Law Rep. 10 Ex. 172.
(3) 10 App. Cas. 14, 27.
(4) 16 M. & W. 547; 5 Ex. 166.
(5) 2 Q. B. D. 485.
(6) 160 b.
(7) 6th Ed. p. 209.
(8) 2nd Ed. pp. 211–214.
(9) 2nd Ed. p. 203.
(10) 4th Ed. vol. ii. p. 140.

STIRLING, J.
1893
HOWITT v EARL OF HARRINGTON.

Strafford (1). The lord has an estate at common law in rent issuing out of copyholds, and a real action to recover the same would formerly lie, just as in the case of freehold rents: *Gilbert* on Tenures (2); *Watkins* on Copyholds (3). Again a copyholder in fee may prescribe against his lord: *Viner's* Abridgement (4); *In re Lidiard and Jackson's and Broadley's Contract* (5).

Hastings, Q.C., and *Archibald Brown*, for the Defendant, the lord of the manor:—

There are many points of difference between quit rents payable in respect of copyholds and chief rents payable in respect of ancient freeholds. The latter are separate tenements altogether, although they pass with the manor: *Elton* on Copyholds (6). Moreover, copyhold quit rents are incident to the reversion in the lord, and are consequently in the same position as conventional rents: *Gilbert* on Tenures; *Laughter* v. *Humphrey* (7); *Bennet's Case* (8). In *Grant* v. *Ellis* (9) *Rolfe*, B., lays it down that the word "rent" in the 2nd section of the statute must be confined to rents existing as an inheritance distinct from the land, and for which before the statute the party entitled might have had an assize, such as ancient rent-service, fee-farm rents and the like. We rely upon this interpretation of the word, and contend that a copyhold rent must be treated as on the same footing as a leasehold rent. The question is, whether the lord has an interest in the rent as distinct from the tenement out of which it arises. There is no prescription by a copyholder against his lord except as to rights appertaining to the land as distinguished from his tenure. *In re Lidiard and Jackson's and Broadley's Contract* cannot be taken as deciding the point. In *Doe* v. *Hellier* (10) it was held that the statute of Hen. 8, c. 2, applied to copyholds; but that was only in the case of suits in the Lord's Court: *Gilbert* on Tenures. It

(1) 3 P. Wms. 148.
(2) 5th Ed. p. 402.
(3) 4th Ed. vol. ii. p. 139.
(4) 2nd Ed. (Copyhold) vol. vi. p. 224.
(5) 42 Ch. D. 254.
(6) 2nd Ed. p. 11.
(7) Cro. Eliz. 524.
(8) 2 Str. 786.
(9) 9 M. & W. 122.
(10) 3 T. R. 162, 172, 173.

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did not apply to services: *Scriven* on Copyholds (1). Copyhold rents were not within the statute of 32 Hen. 8, c. 37, under which executors were empowered to distrain for arrears of rent: *Watkins* on Copyholds (2); *Appleton* v. *Doily* (3); *Viner's* Abridgement (4); *Gilbert* on Tenures (5). It has never yet been held that a copyholder can acquire a freehold estate by mere adverse possession: *Turner* v. *Guardians of West Bromwich Union* (6); *Roe* v. *Ireland* (7). This kind of rent is more analogous to a tithe payment, and it has been held that such payments were subject to the *Tithe Prescription Act* (2 & 3 Will. 4, c. 100), and are not, as between the owner and the payer of the tithe, affected by the statute of 3 & 4 Will. 4, c. 27, that Act only applying as between adverse tithe owners: *Dean of Ely* v. *Cash* (8) and *Dean of Ely* v. *Bliss* (9). Those decisions were rather doubted by Lord *Selborne* in *Irish Land Commission* v. *Grant* (10), but we submit that they were right. By analogy, therefore, the Act does not apply to extinguish a rent payable by a copyhold tenant to his lord: *Payne* v. *Esdaile* (11). The right to the rent is not barred by non-payment so long as the relation of landlord and tenant subsists, except that under sect. 42 of 3 & 4 Will. 4, c. 27, the amount to be recovered is limited to six years arrears: *Archbold* v. *Scully* (12). The lord's estate is in the property out of which the rent issues, and not in the rent itself: *Prescott* v. *Boucher* (13); *North* v. *Earl of Strafford* (14); *Shuttleworth* v. *Garnett* (15). In *Eldridge* v. *Knott* (16) the tenement was freehold, and that case, therefore, does not cover the present.

April 18. STIRLING, J.:—

This action raises a short question of law, namely, whether, where the quit rent payable in respect of a copyhold tenement

(1) 2nd Ed. vol. i. p. 419; 4th Ed. p. 481.
(2) 4th Ed. vol. ii. pp. 140, 152.
(3) Yelv. 135; sub nom. *Apleton* v. *Baily*, 1 Brownl. 102.
(4) 2 Ed. vol. vi. p. 168.
(5) 5th Ed. p. 388.
(6) 9 W. R. 155.
(7) 11 East, 280.
(8) 15 M. & W. 617.
(9) 2 D. M. & G. 459.
(10) 10 App. Cas. 14.
(11) 13 App. Cas. 613.
(12) 9 H. L. C. 360.
(13) 3 B. & Ad. 849.
(14) 3 P. Wms. 148.
(15) Carth. 90.
(16) 1 Cowp. 214.

STIRLING, J.
1893
HOWITT v. EARL OF HARRINGTON

has not been paid for the last fifteen years—that is, roughly, the period—the right to it is barred by the *Statute of Limitations* (3 & 4 Will. 4, c. 27), as amended by the *Real Property Limitation Act*, 1874. The former statute is an Act "for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto." It enacts: "That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows":—

[His Lordship then read the provisions of the Act above set out, and continued:—]

Shortly after the passing of that Act questions arose as to what sort of rents this statute applied to. The statute having been passed in 1833, the question arose in 1836 in the case of *Paget* v. *Foley* (1), though it was not decided, as to whether rents reserved on leases fell within the statute, and Lord Chief Justice *Tindal* says (2): "If we were bound to decide whether or not the case fell within 3 & 4 Will. 4, c. 27, I should say there are strong reasons for thinking that it does not include the present case. That statute is entitled, 'An Act for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto'; which seems more pertinent to rents that are a charge on the land than to mere conventional rents."

In the case of the *Dean of Ely* v. *Bliss* (3) Lord *St. Leonards* says: "I think it clear, from repeated consideration of it, that 'rent,' in the sense in which it is spoken of in the 2nd section means rent of inheritance, and that it does not mean rent reserved by a lease, for example, or rent in the common and ordinary form of a render of rent for property." In the case of *James* v. *Salter* (4) it was held that an annuity accruing by will fell within the 2nd section of the statute, although the 3rd section does not contain any provision as to rent claimed under a will. That section says: "And when the person claiming such land or

(1) 2 Bing. N. C. 679.
(2) Ibid. 688.
(3) 2 D. M. & G. 472.
(4) 3 Bing. N. C. 544.

rent shall claim in respect of an estate or interest in possession, granted, appointed, or otherwise assured by any instrument (other than a will) to him." Then there is a certain provision as to the time at which the right is to be deemed to have accrued. Upon that it was argued that the operation of the 2nd section was limited to the cases which were enumerated in the 3rd section. Lord Chief Justice *Tindal* said (1): "When this case was originally before the Court upon a motion for a new trial, after the rule had been made absolute upon a ground perfectly distinct from that which is now before us, an opinion was expressed by the Judges then in Court, that the present case was excluded from the operation of the second section by reason of its not being comprehended within the third, which third section appeared to us, upon a more hasty view, to contain an enumeration of instances to which only the second section could be held to be applicable. For myself, however, I am ready to admit, and I am authorized at the same time to say the same for my three brethren who were then in Court, that the further argument which we have heard on this point, when brought directly before us for judgment upon the record, and the further opportunity for consideration which has been afforded us, has induced us to alter the opinion we then formed, and that we think (in which my brother *Vaughan* entirely concurs with us), that this case is governed by the second section of the statute, which under the facts found in the special verdict, affords a bar to all claim and title to the annuity. That the case must have been governed by the second section, if that section had stood alone, cannot be doubted; and, upon a more close examination of the third section, the object and intent of it seem to us, to be no more than this: to explain and give a construction to the enactment contained in the second clause as to 'the time at which the right to make a distress for any rent shall be deemed to have first accrued,' in those cases only in which doubt or difficulty might occur, leaving every case which plainly falls within the general words of the second section, but is not included amongst the instances given by the third, to be governed by the operation of the second."

(1) 3 Bing. N. C. 552.

STIRLING, J.
1893
HOWITT
v.
EARL OF
HARRINGTON

Then, in the case of *Owen* v. *De Beauvoir* (1), it was held that a quit rent, payable in respect of a freehold tenement, was liable to be barred by nonpayment under the operation of sect. 2 of this statute.

There is no decision precisely in point as regards a quit rent payable in respect of a copyhold tenement; but if, as is decided by *Owen* v. *De Beauvoir*, a quit rent payable in respect of a freehold tenement falls under sect. 2 of the *Statute of Limitations*, to which I have referred, and is liable to be barred by nonpayment, it is extremely difficult to see why a quit rent payable in respect of a copyhold tenement should not be equally barred; and the burden appears to me to be strongly on those who assert that it is not.

Now the ground, really, on which it is said that this rent payable in respect of a copyhold tenement is not barred by the statute, is rested on some language used by the Court of Exchequer in *Grant* v. *Ellis* (2), which decided that the statute did not apply to rent reserved by a lease. In dealing with the case, and in arriving at the same conclusion as suggested by Lord Chief Justice *Tindal* in the case of *Paget* v. *Foley* (3), the Court first of all discussed the 2nd section, and said: "In order to come to a just conclusion as to the meaning of the word 'rent,' as used in the two sections to which we have referred, it is important first to consider what is the meaning of the word 'recover,' as used in the second section. The enactment is, that no person shall make an entry or distress, or bring an action to 'recover' any land or rent, but within twenty years, &c. Now, so far as relates to land, the word 'recover,' in this passage, clearly means the same thing as 'obtain possession or seisin of.' The clause assumes one party to be in wrongful seisin or possession of land to which another has the right, and then limits the time within which the right must be asserted. If such be the meaning of the word 'recover,' when used with reference to one of its objects—'land,' it is very reasonable to suppose that the Legislature intended it to have the same meaning in respect of the other object—'rent.' It is true, indeed, that with respect

(1) 16 M. & W. 547; 5 Ex. 166. (2) 9 M. & W. 113, 122.
(3) 2 Bing. N. C. 679.

to an incorporeal hereditament like rent there cannot be strictly any wrongful adverse seisin or possession by another. If *A.* claims and receives the rent due to *B.*, *B.* has still the same right against the terre-tenant as if no payment had been made to *A.* The receipt of rent by *A.* is not inconsistent with a similar receipt by *B.*, as the possession of land by *A.* is necessarily inconsistent with possession of the same land by *B.* But still, before the passing of this Act, a party seised of rents, whether rents-service, rent-charges, or rents-seck, might, in case the rent was paid to another or withheld from him, consider himself, if he thought fit, as being disseised of such rent. And a party electing to consider himself so disseised, might have the same remedy by an assize to recover seisin of his rent, as a party disseised of land might have to recover seisin of his land. The judgment in each case was the same, '*quod recuperet seisinam*'; and in each case the party was entitled to a writ of *habere facias seisinam*. . . . . Now we are of opinion, that it is to this sort of recovery only that the second section of the statute has reference; for such is clearly the meaning of the word 'recover,' when used with reference to land; and the plain grammatical construction requires us to give it the same meaning when applied to rent, unless, which is not the case here, some manifest absurdity or inconvenience should result from our so doing. It follows from hence, as a matter of course, that the word 'rent,' in the second section, must necessarily be confined to rent which might in its nature have been the object of such a recovery; and this certainly does not include the rent reserved on common leases for years. According to our view of this case, therefore, even if the second section had stood alone, we should have been of opinion that the pleas in bar afforded no answer to the defendant's cognisance, and consequently that he was entitled to judgment in his favour."

I stop there to remark that, that passage has been commented on by Lord *Selborne* in the House of Lords in the case of *Irish Land Commission* v. *Grant* (1). His Lordship (2) says this: "The point decided in *Grant* v. *Ellis* (3) was that the word

(1) 10 App. Cas. 14. (2) 10 App. Cas. 26.
(3) 9 M. & W. 113.

STIRLING, J.
1893
HOWITT v. EARL OF HARRINGTON.

'rent' in the statute did not mean a conventional rent reserved by a lease; which is undoubted law. Among other reasons for that conclusion, one was founded upon the use of the word 'recover' in the second section, which the Court considered to refer to 'that sort of recovery' which before the passing of the Act was open to 'a party seised of rents, whether rents-service, rent-charges, or rents-seck,' who might 'in case the rent was paid to another, or withheld from him, consider himself, if he thought fit, as being disseised of such rent'; and who, 'electing to consider himself so disseised, might have the same remedy by an assize to recover seisin of his rent, as a party disseised of land might have to recover seisin of his land; the judgment in each case being the same, *quod recuperet seisinam.*' I am far from understanding this (as *Smith*, M.R., appears to have understood it (1)), as meant to imply, that the application of the statute, in cases of rent, as between the owner of the rent and the person 'withholding' it 'from him' could, after the abolition of real and mixed action by sect. 36 of the same statute, depend, in any way, upon the form of proceeding for the assertion or recovery of the right." Having regard to these observations, I think the passage from *Grant* v. *Ellis* (2), which I have just read, is not to be treated as indicating that, in order to bring the case within the statute, precisely similar modes of proceeding for the assertion or recovery of the right must have existed prior to the passing of the statute; but that the rents to which such forms of procedure as mentioned in that judgment were applicable give a general indication of the nature and sort of rents in respect of which the statute is to apply.

Then Lord *Selborne* continues: "If it had been said in *Grant* v. *Ellis*, as to rents of inheritance generally, that the second section of the statute did not apply to any case of mere non-payment of rent, or to any action by the owner of a rent against the person liable to pay it, it would be necessary to determine whether this, or the contrary law laid down in the prior case of *James* v. *Salter* (3), and the subsequent case of *Owen* v. *De Beauvoir* (4), was correct. There can be no doubt, I think, of the correctness of

(1) See 10 Ir. Eq. Rep. 418.
(2) 9 M. & W. 113.
(3) 3 Bing. N. C. 544.
(4) 16 M. & W. 547; 5 Ex. 166.

the decisions in *James* v. *Salter* (1) and *Owen* v. *De Beauvoir* (2)" (so that the correctness of those decisions is recognised in the House of Lords), "which determined that the right to distrain or bring an action for a quit rent, or other perpetual rent, is within the second and third sections of the statute, and may be barred by non-payment for twenty years before distress or action. *Rolfe*, B., who delivered the judgment in *Grant* v. *Ellis* (3), concurred in the decision of *Owen* v. *De Beauvoir*, which was affirmed in the Exchequer Chamber. The mere use of the word 'distress' (as well as 'entry' and 'action') in the second section would have appeared to me to shew that this must have been the intention of the Legislature."

Now, then, let us consider for one moment whether the quit rent payable in respect of a copyhold tenement is more analogous to a quit rent payable in respect of a freehold tenement or to a rent reserved in a lease. To propound such a question seems to be almost to answer it. A quit rent payable in respect of a copyhold is perpetual; it is not limited for a period of time as is a rent reserved by a lease for a term of years. It is a rent (as is put in the cases of *Paget* v. *Foley* (4) and *Dean of Ely* v. *Bliss* (5)) of inheritance. The origin of a quit rent in respect of freeholds and in respect of copyholds is similar. If authority be wanted for that it is enough to mention the passage from *Gilbert* on Tenures, which has been referred to in the course of the argument (6): "A lord of a manor may avow for the rent or service of his copyholder, in any Court at *Westminster*; for he has an estate at common law in the rent, and not a customary estate; and it is due to him upon the same grounds and reasons in law as the rent of freehold lands is." Lastly, and this is not immaterial, it is not a rent which, as between the person to whom it is due and the person by whom it is payable, can be made the subject of agreement like the rent in a lease. In that respect it is similar to a quit rent payable in respect of freehold land. The statute of *quia emptores* has prevented the owners of freehold lands from granting out their lands subject to the

(1) 3 Bing. N. C. 544.
(2) 16 M. & W. 547; 5 Ex. 166.
(3) 9 M. & W. 113.
(4) 2 Bing. N. C. 679.
(5) 2 D. M. & G. 459.
(6) 5th Ed. p. 402.

STIRLING, J.
1893
HOWITT v. EARL OF HARRINGTON.

reservation to themselves of perpetual rents; though lands may be granted in consideration of a rent-charge, that is a different thing. The statute of *quia emptores* does not apply to copyholds; but when copyhold land comes back to the hands of the lord he may grant it out afresh, though only in the same way as it had been granted before. I will read a few words as to that from Mr. *Elton's* Law of Copyholds and Customary Tenures of Land. He says (1): "When the copyhold comes into the hands of the lord, it has been shown that he may regrant it as copyhold, provided that he has created no common law interest in the land higher than a tenancy at will. Upon a grant of this kind he may alienate the tenement by parcels, and apportion the rents and services, but he must not alter them in any other way, as he is 'custom's instrument,' and is not permitted to create what would in effect be a new copyhold. 'He can neither add to nor diminish the ancient rent, nor make the minutest variation in other respects.'"

It seems to me that these are most material matters in considering whether the quit rent payable in respect of copyholds is more analogous to a quit rent payable in respect of freeholds than to rent reserved on a demise of land for a term of years. But no doubt there is one difference between quit rents payable in respect of freeholds and quit rents payable in respect of copyholds. In the case of copyholds, the freehold remains in the lord the immediate freeholder, just as in the case of demises for years it remains in the grantor; and great stress has been laid on that, and I have been referred to a subsequent passage in the judgment in *Grant* v. *Ellis* (2) as justifying the distinction between quit rents payable in respect of copyholds and those payable in respect of freeholds. It is to be observed that that passage occurs when the Court proceeds to deal with the 3rd section, and not when the 2nd section is dealt with. I have already referred to *James* v. *Salter* (3) as shewing that the limitations which are introduced in the 3rd section, being introduced *alio intuitu*, are not to be treated as limiting the effect of sect. 2. However, Baron *Rolfe* proceeds to say in *Grant* v. *Ellis* (4): "In the

(1) 2nd Ed. p. 211.
(2) 9 M. & W. 113.
(3) 3 Bing. N. C. 544.
(4) 9 M. & W. 124.

3rd and some other sections the Act proceeds to define the time, in most, though (as is noticed by Lord Chief Justice *Tindal* in the case of *James* v. *Salter* (1)) not in all possible cases, at which the right to make a distress, for the purpose of recovering any rent, shall be deemed to have first accrued to the party making the same. The first case put is that of a party who has himself, in respect of the estate or interest claimed, been in possession of the rent, and who afterwards has been dispossessed, or has discontinued the receipt of the rent. The estate or interest claimed must, according to the context, mean the estate or interest claimed in the rent, and not in the lands out of which the rent issues. Now, a person entitled to the rent reserved on a common lease for years has no estate in the rent at all: *Prescott* v. *Boucher* (2); he is entitled to the rent, when it from time to time becomes due, as being an incident to his reversion, and not because he has any estate in the rent itself. He is himself the freeholder of the land, and can therefore have no estate in rent issuing out of the land." This is the passage relied on by the learned counsel for the Defendant in this case. But one must not omit to read what follows: "The word 'interest' indeed" (for the words in the statute are "estate or interest," and not "estate" only) "is of so large and comprehensive a nature, as perhaps to embrace the right which the reversioner has in the rent as incident to his reversion; still that interest can in no fair sense be described as the interest claimed. What is claimed by a landlord, distraining for rent on a common lease for years, is the amount of the arrears, wholly irrespective of the extent of his estate or interest in the reversion, as an incident to which the right to those arrears has accrued; what he 'recovers' by his distress is the amount due for arrears of rent, and will be the same whether he is tenant in fee simple, tenant for life, or tenant for years. The statute, in this branch of sect. 3, clearly looks to the party recovering the same estate or interest of which he was previously possessed, and of which he had been dispossessed; and this is altogether inapplicable to a distress for rent incident to a reversion expectant on a common lease for years."

(1) 3 Bing. N. C. 544. (2) 3 B. & Ad. 849.

STIRLING, J.
1893
HOWITT
v.
EARL OF
HARRINGTON.

It is said that here the rent is incident to what is termed the reversion, or the legal freehold, which is vested in the lord. The question is, is that so? Has the lord got an estate in his rent? On that, Chief Baron *Gilbert*, in the passage which I have already cited, distinctly says that he has an estate at common law in the rent; and that, in the absence of any authority to the contrary, is enough for me to act upon. At all events it does shew this —that the lord has such an "interest" in the rent as brings him within the words "estate or interest." If that which he has be not an estate, it is so near it that one of the most learned Judges and text-writers on English law has failed to preserve the distinction between them. It seems to me that in this case what is here claimed is the interest, the rent, which the Defendant had before the Plaintiff or his predecessor in title ceased to pay, and that the words in sect. 3, "estate or interest," are applicable to a distress for such a rent, although they are altogether inapplicable to a distress for rent incident to a reversion expectant on a common lease for years.

I think that under those circumstances the interpretation of the statute, which is a modern statute, has been fixed for me with reasonable clearness, and I, therefore, hold that this quit rent is much more analogous in its nature and properties to a quit rent payable in respect of freehold land, than to a rent reserved on a demise.

In my judgment, therefore, the Plaintiffs are right, and the point of law raised on the pleadings must be decided in their favour.

Solicitors: *Peacock & Goddard*, agents for *Rothera & Sons, Nottingham; Walfords.*

G. A. S.

NICHOLSON *v.* FIELD.

KEKEWICH, J.

1893 March 25.

Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 31, *sub-ss.* 1, 6—*Appointment of New Trustees—Trustee predeceasing Testator.*

Sect. 31 of the *Conveyancing and Law of Property Act*, 1881, does not enable the personal representative of the survivor of two trustees nominated by a will, but dying before the testator, to appoint new trustees of the will.

PETITION.

Frederick Nicholson, who died on the 13th of August, 1886, by his will, dated the 3rd of February, 1864, gave his residuary personal estate to *John Black* and *Richard Hodson* upon certain trusts, and appointed them trustees and executors of his will. The will contained no provisions for the appointment of new trustees thereof.

Richard Hodson died on the 29th of July, 1883. *John Black* died in the year 1884, having made his will, which was duly proved on the 16th of April, 1884, by *Louisa Black*, the sole executrix.

By an indenture dated the 22nd of March, 1887, and made between *Louisa Black* of the first part, the Petitioners, *John T. De Peare* and *William Hodson*, of the second part, and *Fanny Charlotte Nicholson* of the third part, *Louisa Black* purported to appoint *John T. De Peare* and *William Hodson* to be trustees of the will of *Frederick Nicholson* in the place of *Richard Hodson* and *John Black*, who had so predeceased him.

Upon a petition for the purpose of dealing with funds affected by the will, the question arose whether the appointment of *John T. De Peare* and *William Hodson* as trustees of the will by the deed of March, 1887, was valid, and by the petition it was prayed that, if necessary, they might be appointed by the Court to be such trustees.

E. P. Hewitt, for the Petitioners:—

It is submitted that the deed of March, 1887, was a valid appointment of new trustees under sect. 31 of the *Conveyancing*

KEKEWICH, J.
1893
NICHOLSON v. FIELD.

Act, 1881. By the first clause of sub-sect. 6 it is enacted that the provisions of the section relative to a trustee who is dead are to include the case of a person nominated trustee in a will, but dying before the testator. and therefore, under sub-sect. 1, the personal representative of such a trustee has power to appoint new trustees of the will. It is true that in *Wolstenholme* and *Brinton* on the *Conveyancing Acts* (1) it is stated that the first clause of sub-sect. 6 does not enable the personal representative of a person nominated a trustee, but dying before the testator, to appoint new trustees; but the authority relied on for that proposition is *Re Ambler's Trusts* (2), and in that case (according to the report in the *Solicitor's Journal*) Mr. Justice *Kay* said that he followed *In re Orde* (3) and *In re Lightbody's Trusts* (4), but that he did not think that those cases were satisfactory authorities for assuming that the personal representative of a person nominated a trustee could not appoint new trustees; and in *Lewin* on Trusts (5) the point is treated as an open one.

Burnet Morris, for a Respondent.

KEKEWICH, J.:—

As this point has been argued, it is right that I should give my opinion upon it. I have no doubt that where the trustees appointed by a will have died in the lifetime of the testator, there is no power under sect. 31 of the *Conveyancing and Law of Property Act*, 1881, to appoint new trustees. The section contemplates a trustee dying in the lifetime of the testator, and there being a vacancy by reason of the death, and an appointment in that event. But the appointment is to be made by the "surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee;" and it seems to me to be quite impossible to construe these words as meaning that the appointment is to be made by the survivor of two persons neither of whom ever was a trustee.

(1) 6th Ed. p. 88.
(2) 32 Sol. J. 541; 59 L. T. (N.S.) 210.
(3) 24 Ch. D. 271.
(4) W. N. (1886) 3; 33 W. R. 452.
(5) 9th Ed. p. 731.

I think it would be doing great violence to the language to impute such a meaning to the Legislature. I must, therefore, regard these gentlemen as not being properly appointed, and make an order appointing them now.

Solicitors: *Tathams & Hardy; Watson, Sons, & Room.*

C. C. M. D.

WRIGHT, J.

1893
April 15, 17; May 1.

WOLMERSHAUSEN *v.* GULLICK.

[1892. W. 2473.]

Principal and Surety—Co-Surety — Contribution—Right to Contribution after Judgment and before Payment —Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 37—"*Liability*"—*Debt provable in Bankruptcy—Unascertained Liability to Contribute—Limitations, Statute of.*

A surety against whom judgment has been obtained by the principal creditor for the full amount of the guarantee, but who has paid nothing in respect thereof, can maintain an action against a co-surety to compel him to contribute towards the common liability; and for this purpose the allowance of a claim by the principal creditor against the estate of a deceased surety is equivalent to a judgment; and where the principal creditor is a party to the action, the surety may obtain an order upon the co-surety to pay his proportion to the principal creditor. Where the principal creditor is not a party, he may obtain a prospective order directing the co-surety, upon payment by the surety of his own share, to indemnify him against further liability.

Under sect. 37 of the *Bankruptcy Act*, 1883, the liability of a bankrupt co-surety to contribution, though unascertained at the time of the bankruptcy proceedings, is a debt provable in the bankruptcy.

The *Statute of Limitations* does not begin to run against a surety suing a co-surety for contribution until the liability of the surety is ascertained, *i.e.*, until the claim of the principal creditor has been established against him; although at the time of the action for contribution the statute may have run as between the principal creditor and the co-surety.

THE Plaintiff was the widow and executrix of *George Wolmershausen*, whose estate was being administered by the Court, and this action was brought by leave of the Court against *Thomas Gullick* and *John Patton* as co-sureties with the deceased for contribution. In 1871 *Wolmershausen, Gullick*, and *Patton* were directors of the *Original Hartlepool Collieries Company, Limited*, which became insolvent, and was afterwards wound up. In July, 1871, the company borrowed from its bankers, Messrs. *Barclay, Bevan & Co.*, £25,000, and on the 29th of July, *Wolmershausen, Gullick*, and *Patton*, and two other directors, who subsequently became insolvent, gave to the bankers a joint and several promissory note for the amount of the loan as sureties

for the company. On the 21st of January, 1874, these five directors, as such sureties, gave a further joint and several promissory note to the bankers for £10,000. *Wolmershausen* died in May, 1879, and an action for the administration of his estate was commenced in the following July. In October, 1879, the bankers gave notice of a claim against the estate of the deceased for £6000, the balance alleged to be due to them upon the two promissory notes after allowing payments to the extent of £23,500 and £5500 on the said two notes respectively. The Plaintiff resisted the claim, and applied for leave to bring in the co-sureties under the third party procedure; but the application was refused, and there was no evidence that the Defendants had any notice of it. The claim was finally adjudicated upon on the 26th of March, 1890, by Mr. Justice *Stirling*. His Lordship disallowed the claim to the extent of £1,500, the balance alleged to be due on the first note, but allowed it to the extent of £4500, the balance on the second note, with interest, after deducting therefrom a sum of £70 as the estimated amount which the bankers might have recovered from the trustee in bankruptcy of another co-surety. The Plaintiff had not as yet paid any part of this sum. The Plaintiff claimed a declaration that the Defendants were jointly and severally liable to contribute with the Plaintiff to the discharge of the principal debt, and an order upon the Defendants respectively to contribute with the Plaintiff to pay to Messrs. *Barclay, Bevan & Co.* the amount of their debt, or, in the alternative, an order upon them to indemnify the Plaintiff against any sums which she might pay to Messrs. *Barclay, Bevan & Co.* in excess of her proper share. The Defendant *Gullick* pleaded that the action was not maintainable, as the Plaintiff had not paid anything in respect of the debt. The Defendant *Patton* pleaded that in 1887 he had entered into a scheme of arrangement with his creditors under the *Bankruptcy Act*, 1883, and that under that scheme 20*s.* in the pound had been paid to all creditors who had proved their debts, and that such scheme was a bar to the Plaintiff's claim. No claim was made under the bankruptcy proceedings against the debtor in respect of his unascertained liability to contribution, nor was such liability included by the debtor in

WRIGHT, J
1893
WOLMERSHAUSEN v. GULLICK.

his statement of liabilities. The Defendants also pleaded the *Statute of Limitations.*

Farwell, Q.C., and *Birrell*, for the Plaintiff:—

1. An action for contribution can be maintained by a surety against his co-sureties after judgment has been obtained against him for the full amount of the debt, that is to say, after he has been called upon to pay, although he has not actually paid any part of the debt. In *Dering* v. *Earl of Winchelsea* (1), which was approved by Lord *Eldon* in *Craythorne* v. *Swinburne* (2), contribution was ordered after judgment and before payment. In *Ex parte Snowdon* (3) *James*, L.J., expresses his opinion that a surety who has been called upon to pay a debt may compel his co-sureties to contribute towards the payment of the debt to the creditor, and to indemnify him against paying more than his proportion. And see *Hughes-Hallett* v. *Indian Mammoth Gold Mines Company* (4). To compel a surety to pay the whole debt before obtaining contribution may involve him in ruin although he might be perfectly well able to pay his proper share.

2. With regard to the *Statute of Limitations* the last cited authority shews that the Plaintiff could not have commenced this action until the claim of the bankers had been established against her, which was in March, 1890, and the statute only begins to run from that date.

3. With reference to the plea of the Defendant *Patton* there was not at the time of the bankruptcy proceedings any liability for which the Plaintiff could have proved. The claim of the bankers had not been established, and the Defendants might never have been called upon to contribute. The right to contribution is distinct from a debt.

Haldane, Q.C., and *Curtis Price*, for the Defendant *Gullick*:—

It has always been held at common law that a surety is not entitled to contribution against his co-sureties until he has paid more than his proper proportion of the debt. There is no reason

(1) 1 Cox, 318; 2 Bos. & P. 270.
(2) 14 Ves. 160.
(3) 17 Ch. D. 44; 50 L. J. (Ch.) 540; 29 W. R. 654.
(4) 22 Ch. D. 561.

why a creditor who has obtained judgment against one surety may not afterwards obtain judgment against another, and *non constat* that the first surety will be solvent; therefore, until a surety has paid more than his proportion, it is not clear that he will ever be in a position to demand anything from his co-surety: *Davies* v. *Humphreys* (1). And the same principle applies in Equity: *Antrobus* v. *Davidson* (2). *Ex parte Snowdon* (3) and *Hughes-Hallett* v. *Indian Mammoth Gold Mines Company* (4) are decisions in our favour.

In *Dering* v. *Earl of Winchelsea* (5) the point was not argued, and that case has never been cited as an authority for the proposition that for the purpose of enforcing contribution a judgment is equivalent to payment. Further, an adjudication of a claim is not a judgment, and that distinguishes *Dering* v. *Earl of Winchelsea* from the present case. As regards the *Statute of Limitations* the Defendants are statute-barred as against the principal creditor, and the question arises whether a surety who is not statute-barred can proceed against a surety who is. The object of the present action is to compel the Defendants to pay an aliquot proportion of the debt to the principal creditor, but they are under no liability to him. The doctrine of contribution is based upon the theory of the sureties being subject to a common burden; but the sureties are no longer subject to a common burden, and this is due to the fault of the Plaintiff, who ought not to have allowed the claim of the bankers to remain pending for ten years without taking steps to inform the Defendants that she intended to enforce contribution against them.

Whitehorne, Q.C., and *T. L. Wilkinson*, for the Defendant *Patton*:—

The effect of the scheme of arrangement was to release the debtor from all debts provable in bankruptcy, and this contingent liability to contribution was a debt provable in bankruptcy: *Hardy* v. *Fothergill* (6), *Flint* v. *Barnard* (7).

(1) 6 M. & W. 153.
(2) 3 Mer. 569.
(3) 17 Ch. D. 44; 50 L. J. (Ch.) 540; 29 W. R. 654.
(4) 22 Ch. D. 561.
(5) 1 Cox, 318; 2 Bos. & P. 270.
(6) 13 App. Cas. 351.
(7) 22 Q. B. D. 90.

WRIGHT, J.
1893
WOLMERSHAUSEN v. GULLICK.

Farwell, in reply:—

There is a distinction between an action of debt where the plaintiff asks payment to himself and an action for contribution where the plaintiff asks payment to the creditor, and *Davies* v. *Humphreys* (1) is distinguishable on that ground.

Lord Justice *Lindley* in his book on Partnership lays it down that a person entitled to contribution or indemnity may enforce his right before he has sustained actual loss (2).

I ask for an order like that in *Wooldridge* v. *Norris* (3).

WRIGHT, J., at the conclusion of the arguments, dismissed the action as against the Defendant *Patton* with costs, but reserved judgment as between the Plaintiff and the Defendant *Gullick*.

May 1. WRIGHT, J.:—

This case raises an important question with respect to which there is a remarkable absence of express authority. The Plaintiff is the executrix of a person who became surety with four others for a large sum of money advanced by a bank to a company. The surety's estate is being administered in the Court, and the bankers put in a claim as creditors for the whole amount of the guarantee. The Plaintiff resisted the claim and succeeded in reducing it from £6000, but it has been finally allowed for a sum of about £4500. The Plaintiff is now called upon to pay that sum, and brings this action against co-sureties for contribution. The Plaintiff has not yet paid anything. One Defendant I have dismissed from the action on the ground that he is discharged by a composition under sect. 18 of the *Bankruptcy Act*, 1883, inasmuch as it appears to me that his liability to contribute, although not ascertained at the time of the bankruptcy proceedings, nor included in his schedule of liabilities or in the claims or proofs, and not a debt in respect of which an adjudication of bankruptcy could have been sustained, was a liability within the meaning of sect. 37 of the Act, and therefore a debt provable in the bankruptcy: *Hardy* v. *Fothergill* (4).

The principal defence of the other Defendant is that the

(1) 6 M. & W. 153.
(2) 5th Ed. p. 374.
(3) Law Rep. 6 Eq. 410.
(4) 13 App. Cas. 351.

Plaintiff is not entitled to maintain this action until she has paid more than her proportion, or at any rate until she has paid her proportion. The Plaintiff is willing to pay her proportion, but she insists that the actual payment of it is not a condition precedent to her right to sue, and says that at any rate she is not obliged to pay the whole in the first instance and then sue for reimbursement. If she is obliged to pay the whole before actual contribution from the co-surety, the business in which the testator's assets are invested will be embarrassed by the withdrawal of so much of the capital even for a short time. Obviously if a man were surety with nine others for £10,000, it might be a ruinous hardship if he were compelled to raise the whole £10,000 at once and perhaps to pay interest on the £9000 until he could recover the £9000 by actions or debtor summonses against his co-sureties.

The questions are whether the action can be maintained, and what is the precise extent of the relief (if any) which can be given. By the Roman law, as it stood in the time of *Justinian*, sureties had, generally speaking, a right to compel the creditor to enforce payment against them *pro ratâ* only. The superior Courts of common law in this country have never entertained any action for contribution by a surety against his co-surety, except the action for money paid, and from the time of *Davies* v. *Humphreys* (1), which was decided in the year 1840, it has been treated as settled law that the surety cannot maintain this action until he has actually paid more than his own proportion, because this action assumes a debt due and payable to the Plaintiff, and there is no legal debt due and payable, and the creditor may yet enforce payment of the whole balance from the co-surety. Nor did the Courts of common law ever give in the case of co-sureties the equitable relief which they were accustomed to give in many other cases of joint or common liability, by compelling contribution after judgment and before execution by means of a writ of *auditâ querelâ* or *scire facias* to limit the creditor's execution to the proper share payable by the particular defendant. This will be seen from the collection of ancient cases in 3 Rep. pages 12 and following.

(1) 6 M. & . 153.

WRIGHT, J.
1893
WOLMERSHAUSEN v. GULLICK.

By the custom of the City of London an equitable action lay in the City Courts by a surety before he had paid anything to have it ordered that he and his co-sureties should be charged *pro ratâ* only—"*ut uterque eorum oneretur pro ratâ*": *Offley and Johnson's Case* (1) (26 Eliz.).

In the earliest reports and abridgments of cases in Chancery, there is frequent mention of contribution, but there seems to be no reported instance of contribution between sureties before the 17th century, and even in modern times there is very little express authority that the surety has any remedy until he has actually paid too much, and still less authority to shew the precise extent of the relief to which he may be entitled before such payment. In nearly every reported case the surety had before action paid more than his share. Nearly every case and text-book refers to his right to contribution as the right of a surety who has paid more than his proportion. In a few cases the ambiguous expression is used, "when he is called upon to pay more than his proportion."

The following are, I believe, the only reported cases which throw any light on the subject. I begin with two, which are not cases of suretyship, but which illustrate a principle of equity apparently established in other cases of contribution and applicable to this. They are cited in *Vin.* Abr., tit. Contribution, from *Cary's* Reports.

"(27.) If a man grants a rent-charge out of all his lands, afterwards sells his lands by parcels to divers persons, and the grantee of the rent will from time to time levy the whole rent upon one of the purchasors only, he shall be eased in Chancery by a contribution from the rest of the purchasors, and the grantee shall be restrained by order to charge the same upon him only."

"(28.) Sir *Edmund Morgan* married the widow of *Fortescue*, he had his wife's lands distrained alone by the grantee of a rent-charge from her former husband, and therefore sued the grantee in Chancery, to take a rateable part of the rent, according to the lands he held subject to the distress, and notwithstanding the Lord Chief Justice *Popham's* Report, who thought this reasonable, the Lord Chancellor *Egerton* would give him on this bill

(1) 2 Leon. 166.

no relief, but ordered that he should exhibit his bill against the rest of the tenants and grantee both, the one to shew cause why they should not contribute, the other why he should not accept of the rent equally; otherwise it was no reason to take away the benefit of distress from the grantee, which the law gave him."

Three cases of contribution between sureties in the time of *Charles* I. are reported. In *Peter* v. *Rich* (1) the principle was established that in equity, if one of several co-sureties is insolvent, the others contribute as if he had not been a surety. There the plaintiff had paid the whole. In *Morgan* v. *Seymour* (2) the principle upon which the above-cited cases from *Cary*, and the subsequent leading case of *Dering* v. *Earl of Winchelsea* (3), were decided seems to be applied in the fullest extent to the case of co-sureties, the principal creditor being made a party to the suit and the co-surety being ordered to pay direct to the creditor. The report is as follows:—

"The plaintiff, with Sir *Edward Seymour*, the defendant, being bound with Sir *William St. Johns* for the proper debt of the said *St. Johns*, to the defendant *Rowland* in a bond of £200 for the payment of £100, and the said *Rowland* sued the plaintiff only on the said bond, the plaintiff seeks to have the said *Seymour* contribute and pay his part of the said debt and damages, the said *St. Johns* being insolvent. This Court was of opinion, that the said *Seymour* ought to contribute and pay one moiety to the said *Rowland*, and decreed *Rowland* to assign over the said bond to the plaintiff and *Seymour*, to help themselves against the said *St. Johns* for the said debt."

In *Swain* v. *Wall* (4) the plaintiff surety had paid the whole of the creditor's demand, and the only point decided was that his claim for contribution might be controlled by express contract. In *Hole* v. *Harrison* (1673) (5) the rule in *Peter* v. *Rich* was followed. In 1786, in *Lawson* v. *Wright* (6) the plaintiff co-surety had paid off the whole liability, and he sued for contribution. Sir *Lloyd Kenyon* said that it had been

(1) 1 Ch. Rep. 34.
(2) Ibid. 120.
(3) 1 Cox, 318; 2 Bos. & P. 270.
(4) 1 Ch. Rep. 150.
(5) 1 Ch. Ca. 246; Finch, 15, 203.
(6) 1 Cox, 275.

WRIGHT, J.
1893
WOLMERSHAUSEN v. GULLICK.

established ever since the origin of the Courts of Equity that one surety had a right to call upon another for contribution in cases of this nature. The only question was whether proof of payment by the surety was enough without proof that the principal debtor was insolvent. The arguments seem to shew that counsel and the Court thought that an action could be maintained by a surety before he had paid anything, if he could prove the principal debtor to be insolvent. In 1787 the leading case of *Dering* v. *Earl of Winchelsea* (1) was decided in the Exchequer as a Court of Equity by Lord Chief Baron *Eyre*. There a surety by bond for £4000 to the Crown had had judgment against him at the suit of the Crown for nearly the whole amount, and he filed his bill for contribution against sureties bound by distinct bonds to the same creditor to secure the same liability of the same debtor, and the only point reported as argued or decided was whether there should be contribution between sureties bound under distinct contracts of suretyship without privity of contract between themselves. After deciding that the right to contribution depends primarily, not upon contract, but upon the equitable principle that "*in equali jure* the law requires equality—the charging one surety discharges the other, and each therefore ought to contribute to the onus," the Court proceeded to declare the plaintiff's right to contribution, and ordered the other sureties to pay their shares to the creditor. No similar order is to be found in any other case of sureties except *Morgan* v. *Seymour* (2). But it is in strict accordance with the principle of the cases cited from *Cary*, and it is hardly possible to suppose that so obvious and important a matter as the jurisdiction to make such an order could have been overlooked. It appears, from the report of the case in 2 *Bos.* and *P.*, though not from the report in 1 *Cox*, that the Crown as creditor was made a defendant to the bill under the name of the Attorney-General; and there could not have been any object in this except that the Crown should be controlled and prevented from enforcing its legal right inequitably against one alone of the sureties. That nothing so important was overlooked may be inferred from the remarkable observations

(1) 1 Cox, 318; 2 Bos. & P. 270. (2) 1 Ch. Rep. 120.

of Lord *Eldon*, who had himself argued the case, and who said, in *Craythorne* v. *Swinburne* (1807) (1):—

"In the case of *Dering* v. *Earl of Winchelsea* (2), which, I recollect, was argued with great perseverance . . . it is decided that, whether they are bound by several instruments, or not, whether the fact is or is not known, whether the number is more or less, the principle of equity operates in both cases; upon the maxim, that equality is equity: the creditor, who can call upon all, shall not be at liberty to fix one with payment of the whole debt; and upon the principle, requiring him to do justice, if he will not, the Court will do it for him. . . . I argued that case; and was much dissatisfied with the whole proceeding, and with the judgment; but I have been since convinced, that the decision was upon right principles. Lord Chief Justice *Eyre* in that case decided, that this obligation of co-sureties is not founded in contract: but stands upon a principle of equity; and Sir *S. Romilly* has very ably put, what is consistent with every idea, that, after that principle of equity has been universally acknowledged, then persons, acting under circumstances, to which it applies may properly be said to act under the head of contract, implied from the universality of that principle. Upon that ground stands the jurisdiction assumed by Courts of law. . . . The doctrine of contribution . . . . stands upon this; that all sureties are equally liable to the creditor; and it does not rest with him to determine, upon whom the burden shall be thrown exclusively; that equality is equity; and, if he will not make them contribute equally, this Court will finally by arrangement secure that object."

Several other cases of contribution between sureties occur in the books in Lord *Eldon's* time, but in none of them is there any reference to the point in question. In *Ex parte Gifford* (1802) (3) Lord *Eldon* said:—

"The principal is to discharge all the obligations of all the sureties: but they stand with regard to each other in a relation, which gives rise to this right among others; that, if one pays more than his proportion, there shall be a contribution for a

(1) 14 Ves. 160. (2) 1 Cox, 318; 2 Bos. & P. 270.
(3) 6 Ves. 805, 808.

WRIGHT, J. 1893 WOLMERSHAUSEN v. GULLICK.

proportion of the excess beyond the proportion, which in all events he is to pay."

In *Craythorne* v. *Swinburne* (1), already cited, Lord *Eldon* states the right of the surety in these terms:—"It has been long settled, that, if there are co-sureties by the same instrument, and the creditor calls upon either of them to pay the principal debt, or any part of it, that surety has a right in this Court, either upon a principle of equity, or upon contract, to call upon his co-surety for contribution."

In *Antrobus* v. *Davidson* (1817) (2) it was held that the creditor cannot bring an action *quia timet* against a surety to force him to set apart money to provide for the possibility of a debt becoming due from the principal debtor.

In 1821, in *Stirling* v. *Forrester* (3), in the House of Lords, Lord *Redesdale* said:—"The principle established in the case of *Dering* v. *Lord Winchelsea* (4) is universal, that the right and duty of contribution is founded in doctrines of equity; it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract, but always in conscience, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. That was the principle of decision in *Dering* v. *Lord Winchelsea*. . . . The question depends upon equity, not upon contract; and in this case a contract is to be implied. The decision in *Dering* v. *Lord Winchelsea* proceeded on a principle of law which must exist in all countries, that where several persons are debtors, all shall be equal."

In 1861, in *Reynolds* v. *Wheeler* (5), which was an action for money paid, *Erle*, C.J., said:—"If one surety is called on to

(1) 14 Ves. 160.
(2) 3 Mer. 569.
(3) 3 Bli. 575, 590, 596.
(4) 1 Cox, 318; 2 Bos. & P. 270.
(5) 30 L. J. (C.P.) 350; 10 C. B. (N.S.) 561.

pay the whole debt he is entitled to have contribution from his co-surety," and *Williams*, J., said:—"It is now well established by many cases that where two parties stand in the relation of co-sureties, and one of them is applied to for more than his share, he is entitled to call upon his companion for reimbursement." But having regard to the common law, as settled by *Davies* v. *Humphreys* (1), it seems plain that these expressions must be understood as assuming actual payment by the plaintiff of more than his share.

In 1868, in *Wooldridge* v. *Norris* (2), executors of a surety obtained an order for indemnity and payment by a person who had covenanted to indemnify the testator against his liability as surety, although the executors had not paid or been sued. The judgment, however, proceeded on the particular terms of the covenant.

In the same year, in *Cruse* v. *Paine* (3), where a vendor of shares was entitled to be indemnified by his vendee against calls, Lord *Hatherley* declared the liability of the vendee for future calls, and ordered him to indemnify the vendor's estate, and to procure its release or discharge "either by payment of the calls or otherwise, with liberty to apply in Chambers, &c."

In 1872, in *Bechervaise* v. *Lewis* (4), *Willes*, J., said:—"The surety, . . . as soon as his obligation to pay is become absolute, has a right in equity to be exonerated by his principal."

In 1874, in *Lacey* v. *Hill* (5), upon a creditor's claim in an administration, *Jessel*, M.R., said:—

"Whatever may be the case at law . . . it is quite plain that in this Court any one having a right to be indemnified has a right to have a sufficient sum set apart for that indemnity. It is not very material to consider whether he is entitled to have that sum paid to him, or whether it must be paid direct over to the creditor. If the creditor is not a party, I believe that it has been decided that the party seeking indemnity may be entitled to have the money paid over to him."

In 1877, in *Lloyd* v. *Dimmack* (6), Mr. Justice *Fry* refused to

(1) 6 M. & W. 153.
(2) Law Rep. 6 Eq. 410.
(3) Law Rep. 6 Eq. 641; 4 Ch. 441.
(4) Law Rep. 7 C. P. 372, 377.
(5) Ibid. 18 Eq. 182, 191.
(6) 7 Ch. D. 398.

WRIGHT, J.
1893
WOLMERSHAUSEN v. GULLICK.

declare prospectively the right of the assignor of a long lease to indemnity against future breaches of covenant by the assignee, and in *Hughes-Hallett* v. *Indian Mammoth Gold Mines Company* (1) the same learned Judge refused to make an order *quia timet* against a person for whom the plaintiff held shares to indemnify the plaintiff, there being no evidence that calls were likely to be made, but said: "There have been, undoubtedly, cases in which, where a contract for indemnity existed, and a right to sue upon that contract had arisen, the Court has declared the right to indemnity generally, and has put matters in such a train that, when the subsequent right to indemnity should arise, the indemnity might be worked out. Some forms of judgments in that class of cases are to be found in the last edition of *Seton* on Decrees, and they shew that where a person has taken shares for another, and a call has been made which has not been met by the person liable to pay it, the trustee who is entitled to an indemnity may obtain a declaration of his title generally, and may possibly obtain liberty to apply from time to time to work it out." So, in the similar case of *Hobbs* v. *Wayet* (2), where a call on shares was also threatened, Mr. Justice *Kekewich* made a declaration of the right to indemnity.

The preceding cases from *Cruse* v. *Paine* (3) downwards have been referred to, not as having any direct bearing on the rights of co-sureties, but as throwing some light on the nature and extent of the relief which can be given in equity in analogous matters. There are only two remaining authorities. In 1881, in *Ex parte Snowdon* (4), a surety who had paid his own share and no more, and who had not been called upon to pay more, issued a debtor's summons against his co-surety for half of what had been paid, and he obtained an adjudication of bankruptcy, which the Court of Appeal annulled on the ground that, until a surety had paid more than his share, there is no legal or equitable debt to sustain bankruptcy proceedings. Lord Justice *James* is reported to have said:—"I think your proper remedy is to call on *Snowdon* to pay the bank £541. . . . I believe the

(1) 22 Ch. D. 561, 565.
(2) 36 Ch. D. 256.
(3) Law Rep. 6 Eq. 641; 4 Ch. 441.
(4) 17 Ch. D. 44, 46, 47.

proper course when a surety is called upon to pay a part of the whole debt for which he is liable would be to bring an action against his co-sureties to compel them to contribute to pay the debt to the creditor, just as he would be entitled to call on them for contribution if he had been sued by the creditor, asking that he should be indemnified by his co-sureties against paying the whole debt, or whatever risk he ran." The report in the *Law Journal* (1) is as follows:—"The proper course when a surety is called upon to pay the whole debt, for which he is liable with his co-surety, is to call upon his co-surety for contribution and to indemnify him against paying the whole; and the only mode in which in equity you can compel a co-surety to pay his proportion of the debt is to shew that you have paid your proportion, or more than your proportion, of the debt, and are liable for the residue." In the *Weekly Reporter* (2) it is, "The proper course when a surety is called upon to pay the whole debt for which he is liable would be to call upon his co-sureties for contribution, just as he would be entitled to have done if a bill had been filed against him by the principal creditor, asking that he should be indemnified against paying the whole." In 1883, in *Macdonald* v. *Whitfield* (3), Lord *Watson, pro cur.*, declared the right to contribution of a surety who had not paid, but had had judgment against him, in this form—"Entitled and liable to equal contribution *inter se.*" In Lord Justice *Lindley's* work on Partnership (4), it is observed that "before the passing of the *Judicature Acts*, a right to contribution or indemnity, arising otherwise than by special agreement, was only enforceable at law by a person who could prove that he had already sustained a loss. But in equity it was very reasonably held, that even in the absence of any special agreement, a person who was entitled to contribution or indemnity from another could enforce his right before he had sustained actual loss, provided loss was imminent; and this principle will now prevail in all divisions of the High Court. Therefore a person who is entitled to be thus indemnified against loss is not obliged to wait until he has suffered, and perhaps been ruined,

(1) 50 L. J. (Ch.) 540, 541.
(2) 29 W. R 654.
(3) 8 App. Cas. 733, 750.
(4) 5th Ed. p 371.

WRIGHT, J.
1893
WOLMERSHAUSEN v. GULLICK

before having recourse to judicial aid. Thus, in the ordinary case of principal and surety, as soon as the creditor has acquired a right to immediate payment from the surety, the latter is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the surety from his obligation; and where one person has covenanted to indemnify another, an action for specific performance may be sustained before the plaintiff has actually been damnified; and the limit of the defendant's liability to the plaintiff is the full amount for which he is liable; or if he is dead or insolvent the full amount provable against his estate, and not only the amount of dividend which such estate can pay. In strict conformity with these principles, partners and directors who are individually liable to be sued on bonds and notes, which as between them and their co-partners are to be regarded as the bonds and notes of the firm or company, are entitled to call for contribution before these bonds or notes have been actually paid. So a trustee of shares liable to calls is entitled to be indemnified by his *cestui que trust* against them before they are paid." This statement of the law is an authority in favour of the view that some relief can be given, but it does not specify the form or limit of the relief; nor do any of the authorities cited in the notes throw any further light on the matter. Nor have I been able to obtain assistance from English or American writers on equity or on the law of suretyship. The Plaintiff's difficulties have been increased by this, that an application by her for leave to use the third party procedure ordinarily applicable in cases of contribution or indemnity was refused in the administration action on the ground that the procedure is not available in an administration action. And even if the question had arisen upon third party procedure, nearly the same difficulties would have occurred.

In this state of the authorities I think that, if the Plaintiff had made the creditor a Defendant to the present action, I ought to have held that the allowance of the principal creditor's claim in the administration action was equivalent to a judgment against the Plaintiff for the whole amount of the guarantee, and that on the precedents of *Morgan* v. *Seymour* (1) and *Dering* v.

(1) 1 Ch. Rep. 120.

Earl of Winchelsea (1), the Plaintiff would have been entitled to a declaration of her right to contribution and to an order upon the solvent co-surety to pay his proportion to the principal creditor. The principal creditor not being a party, I think that I cannot order payment to him or directly prevent him from enforcing his judgment against the Plaintiff alone. Nor can I at present order the co-surety to pay his half to the Plaintiff, for the Plaintiff cannot give him a discharge as against the principal creditor, and this case is not like the case of a Plaintiff who merely claims indemnity, as in the cases referred to by *Jessel*, M.R., in *Lacey* v. *Hill* (2), in which no question arises as to any other party. But I think that I can declare the Plaintiff's right, and make a prospective order under which, whenever she has paid any sum beyond her share, she can get it back, and I therefore declare the Plaintiff's right to contribution, and direct that, upon the Plaintiff paying her own share, the Defendant *Gullick* is to indemnify her against further payment or liability, and is, by payment to her or to the principal creditor or otherwise, to exonerate the Plaintiff from liability beyond the extent of her own share. The Plaintiff must have liberty to apply in Chambers and generally to apply.

A point was made as to the *Statutes of Limitation*. The principal creditor's claim was put in in 1879. But I think that I must hold that, even if the statute can begin to run before the surety has paid more than his proportion, at any rate it does not run until his liability is ascertained, and that did not occur until 1890.

There was another point made that the Plaintiff ought to have proved against the estate of the co-surety *Patton*, but if that were so, so might the Defendant *Gullick*. It is agreed that, if such proof could have been and had been made, it is to be taken that £200 would have been received. I think that the Plaintiff and Defendant should each bear half of this, and the Defendant's liability to the Plaintiff will be reduced accordingly by £100. I think that the Plaintiff acted reasonably and in the interest of all parties in resisting and reducing the principal creditor's claim, and that the Defendant ought in equity to contribute half

(1) 1 Cox, 318; 2 Bos. & P. 270. (2) Law Rep. 18 Eq. 182, 191.

WRIGHT, J.

1893

WOLMERSHAUSEN v. GULLICK

the costs of those proceedings: see *Kemp* v. *Finden* (1); *Lawson* v. *Wright* (2); *Hole* v. *Harrison* (3). I therefore give judgment in that form in favour of the Plaintiff with costs.

Solicitors: *Davidson & Morriss; Frederick Taylor; Greenop & Sons.*

(1) 12 M. & W. 421. (2) 1 Cox, 275.
(3) 1 Ch. Ca. 246; Finch, 15, 203.

H. B H.

HAMPDEN *v.* EARL OF BUCKINGHAMSHIRE.

C.A.
1892
KEKEWICH, J.
Dec. 20.
C.A.
1893
Jan. 25; *Feb.* 14; *April* 24.

[1892 H. 4693.]

Settled Land Acts—Tenant for Life—Power of Mortgaging to pay off Incumbrances—Discretion—Interests of Parties entitled under Settlement—Settled Land Acts, 1882 (45 & 46 *Vict. c.* 38), *s.* 53; 1890 (53 & 54 *Vict. c.* 69), *s.* 11.

By sect. 11 of the *Settled Land Act*, 1890 (which Act and the *Settled Land Act*, 1882, are to be read and construed together as one Act): "Where money is required for the purpose of discharging an incumbrance on the settled land or part thereof, the tenant for life may raise the money so required . . . on mortgage of the settled land . . . , and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly;" but "incumbrance" under that section does not include a life annuity. By sect. 53 of the *Settled Land Act*, 1882, "a tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

The tenant for life of settled land, part of which was mortgaged and part was not, and the whole of which was charged with the payment of certain life annuities, proposed to raise a sum of money by mortgaging the settled land (including the part of it not then subject to any mortgage) in order to pay off the existing mortgages and certain pecuniary legacies given by the settlement. The proposed mortgage would, by virtue of sects. 20 and 21 of the *Settled Land Act*, 1882, take priority over the annuities and all other charges and estates created by the settlement. It was not proposed to pay off the annuitants out of the money to be raised, nor could they be so paid off; and, having regard to the estimated probable sum which would be produced by a sale of the land under the powers given by the *Settled Land Acts*, it appeared that such a sale would preserve, whilst the proposed mortgage would unjustly prejudice, their interests. It was assumed that the tenant for life in deciding to effect the proposed mortgage was acting honestly, and with the desire, *bonâ fide*, to preserve his family estates for those intended by the settlor to enjoy them:—

Held, that sect. 11 of the *Settled Land Act*, 1890, gave the tenant for life power to mortgage the unmortgaged part of the settled land in order to pay off the incumbrances on the other part; but that, having regard to sect. 53 of the *Settled Land Act*, 1882, and to the circumstances, the Court had power to interfere, and ought to interfere, to restrain him from effecting the proposed mortgage.

BY his will, dated the 31st of October, 1877, the late Earl of *Buckingham*, who was entitled to estates in *Ireland* and in.

C. A.
1893
HAMPDEN
v.
EARL OF
BUCKINGHAMSHIRE

Buckinghamshire, charged the whole of those estates with the payment of life annuities, amounting to £2552, in favour of the Plaintiffs, to whom he gave powers of distress and entry. He also bequeathed to his younger children and others certain pecuniary legacies, and he declared that all charges and incumbrances which should affect his Irish or *Buckinghamshire* estates respectively should be primarily charged on and paid out of such estates respectively in exoneration of his general estate and effects. He then devised his Irish and *Buckinghamshire* estates in strict settlement. The testator died in October, 1885. The whole of the Irish estates and the *Buckinghamshire* estates, with the exception of an estate called "*Beechwoods*," were respectively subject to mortgages. In an action for the administration of the testator's estate, the personalty was exhausted by the proofs of the mortgagees, and £15,000 and interest was left still due to the mortgagees of the *Buckinghamshire* estates. The Defendant, who was tenant for life under the settlement created by the will, now proposed to mortgage all the *Buckinghamshire* estates, including *Beechwoods*, for £40,000, and thereout to pay off what was still due to the mortgagees, and also to pay the pecuniary legatees, who had been deprived, by reason of the proofs of the mortgagees, of the personal estate out of which alone the legacies were payable. The proposed mortgage of all the *Buckinghamshire* estates would, under sects. 20 and 21 of the *Settled Land Act*, 1882, override and not be subject to the charge on those estates in favour of the annuitants. Attempts had been made, without success, to sell the Irish estates. A sale of the *Buckinghamshire* estates, apart from *Beechwoods*, could not be effected; and, if it could, such sale would not yield enough to pay off the mortgagees and pecuniary legatees. The saleable value of the *Buckinghamshire* estates, including *Beechwoods*, was estimated at £80,000. No purchaser had yet been found; but a sale at that price would be far more beneficial to the annuitants than the proposed mortgage, because if that mortgage was effected the yearly income available for payment of the annuities would be about £490, whereas if a sale at the price of £80,000 was effected, the available yearly income would be about £1200. *Beechwoods* produced a yearly rent of about

£1460. After paying interest on mortgages and outgoings the *Buckinghamshire* estates, excluding *Beechwoods*, produced no income.

This was an action by the annuitants against the tenant for life for an injunction to restrain him from mortgaging or offering for mortgage the estates in the county of *Buckingham* in such a way as to create a first charge over any part of *Beechwoods*.

The Plaintiffs moved for an injunction, and on the 20th of December, 1892, the motion came on to be heard before Mr. Justice *Kekewich*.

Warmington, Q.C., and *Birrell*, for the Plaintiffs, referred to *In re Earl of Radnor's Will Trusts* (1), *Cardigan* v. *Curzon-Howe* (2), *In re Lord Stamford's Settled Estates* (3), the *Settled Land Act*, 1890, s. 11, and the *Settled Land Act*, 1882, s. 53.

[KEKEWICH, J., referred to *In re Duke of Marlborough's Settlement* (4).]

Sir *H. Davey*, Q.C., and *Macnaghten*, for the Defendant, were not called upon.

KEKEWICH, J.:—

The real question is whether the Earl of *Buckinghamshire* as tenant for life has or has not statutory power to make the proposed mortgage, and as I read the Act of 1890 the power is abundantly clear. I may forget, for the purpose of deciding this point of law, many of the details of the case, as regards the particular sum of money in question, or the origin of the urgent necessity existing at the present moment; I may forget also the circumstance that part of the money which it is now proposed to raise will go to recoup the personal estate which has been exhausted in payment of charges affecting the real estate, and I may regard the facts simply thus: A testator, being seised of two estates—one free from incumbrances, and the other subject to incumbrances—which amount in the whole to (say) £40,000, devises both the estates

(1) 45 Ch. D. 402.
(2) 41 Ch. D. 375.
(3) 43 Ch. D. 84.
(4) 30 Ch. D. 127; 32 Ch. D. 1.

C. A.
1893
HAMPDEN
v.
EARL OF
BUCKINGHAMSHIRE.
Kekewich, J.

in settlement, and charges in favour, it may be, of younger sons or daughters, the unincumbered estate to the extent of £10,000. The tenant for life under the settlement so created is minded, and thinks on the whole it will be best, to raise £40,000 to pay off the mortgage on the estate which is charged with that sum, and, finding a difficulty in raising the £40,000 on the property which up to that time has alone been charged with that sum, he proposes to include in the security the whole estate, incumbered and unincumbered, comprised in the settlement, and with this result, that the younger children, who looked forward to having £10,000 raised out of the unincumbered property, are likely to find themselves in very great difficulty in raising any part of it, and, instead of having an immediate charge for £10,000, will only have a charge subject to an overriding mortgage for £40,000. Is there any reason why that should not be done under the *Settled Land Act*, 1890? The language of sect. 11 of that Act is express. [His Lordship read the section, and continued:—]

The expression "settled land" means, of course, the whole of the land comprised in the settlement; but in the section which I have read the Legislature has made further provision by adding the words "or part thereof," and here there is an incumbrance on a part thereof. What, then, is the power? The tenant for life may raise the money required for the purpose of discharging an incumbrance on the settled land or part thereof, and he may raise that money on mortgage of what? "Of the settled land, or of any part thereof." The terms are the plainest possible. He may mortgage the whole of the settled estate, or the part which has been hitherto unincumbered to the exclusion of the part incumbered, or, *vice versâ*, the part which has been hitherto incumbered to the exclusion of the part unincumbered. The Act gives him a discretionary power to be exercised by him in the best way he can to raise money, if it is right or convenient that it should be raised. Therefore, regarding the matter simply as a question of the existence of a statutory power, I entertain no doubt that there is the power, and the unfortunate accident that those who have a charge on the unincumbered estate will be postponed does not defeat the statutory power. On the con-

trary, I should think that the framer of the Act, or, as we should rather say, the Legislature, intended that this particular case should be included.

But then it is rightly said that the tenant for life is in the position of a trustee, and that accordingly, whether under the *Settled Land Acts* or otherwise, the Court will take care that he does nothing that is not *bonâ fide*, and will require him as trustee of the statutory power to have regard to the interests of other parties. Sect. 53 of the Act of 1882 expresses that in terms, and the effect of that section is so expounded in the case of *In re Earl of Radnor's Will Trusts* (1), to which Mr. *Warmington* referred me. The tenant for life is a trustee—that is to say, he is to exercise the power to the best of his ability with an honest discretion for the benefit of all parties concerned, and it is said that he cannot do what he proposes to do because he will defeat the rights of the annuitants, the persons who in this case represent the younger sons or daughters entitled to portions. If I were persuaded that this mortgage must eventually bring about the extinction of the settled estate, of course that would at once be a reason for granting the injunction and stopping the mortgage. A tenant for life has no right to do that which can only entail extra expense and trouble, and if at the end of a few months a sale were inevitable, the proposed mortgage ought not to be allowed. But the Act of 1890 obviously contemplates that the power of mortgaging which it confers should be exercised by the tenant for life as a means of preservation of the family property. A power of sale already existed in the tenant for life, and this Act was passed in order that this additional power might be vested in him, not with the view of destroying, but with the view of conserving the property—that is to say, that a mortgage should be effected for the purpose of discharging the existing incumbrance, and substituting for the incumbrancer another who might require a different security or other rate of interest, and the creation of that incumbrance would no doubt saddle the estate with some additional costs. So that unless it can be shewn that the proposed course is suicidal, it seems to me that the mere wish and intention of the tenant for life to

(1) 45 Ch. D. 402, 416, 417.

C. A.
1893
HAMPDEN v. EARL OF BUCKINGHAMSHIRE.
Kekewich, J.

create a charge which may be onerous to the estate, and onerous to those interested other than himself, cannot be treated as an indication of want of *bona fides*. If he is exercising the power to the best of his discretion, and doing his best to raise money on the best possible terms and to preserve the estate, and if nothing of the kind I have suggested is proved, and nothing like *mala fides* charged, it is difficult for me to see how the Court is to control his discretionary exercise of the power. The course he proposes to take may be foolish, though he thinks it is not; but no reason is adduced which can lead the Court to suppose that he is crazed as regards this particular transaction, so that one may set aside his discretion and say that, however honest a man he may be, he is mad, and therefore cannot exercise an honest discretion. I see no reason why I should interfere with his discretion on that or any other ground, and therefore I think this application must fail.

C. C. M. D.

C. A.

The Plaintiffs appealed. The appeal was heard on the 25th of January and the 14th of February, 1893.

Warmington, Q.C., and *Birrell*, for the Appellants:—

Sect. 11 of the *Settled Land Act*, 1890 (1), does not enable the Respondent to mortgage the *Beechwoods*, in order to pay off the

(1) By sect. 2 of the *Settled Land Act*, 1890 (53 & 54 Vict. c. 69), "The *Settled Land Acts*, 1882 to 1889, and this Act, are to be read and construed together as one Act."

By sect. 11: "(1.) Where money is required for the purpose of discharging an incumbrance on the settled land or part thereof, the tenant for life may raise the money so required, and also the amount properly required for payment of the costs of the transaction on mortgage of the settled land, or of any part thereof, by conveyance of the fee-simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or any part thereof, or otherwise, and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly.

"(2.) Incumbrance in this section does not include any annual sum payable only during a life or lives or during a term of years absolute or determinable."

By sect. 53 of the *Settled Land Act*, 1882 (45 & 46 Vict. c. 38), "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

mortgages upon that part of the *Buckinghamshire* estates which is already mortgaged. The "settled land" which can be mortgaged under that section is settled land which is subject to incumbrances. The object was to give a tenant for life power to mortgage the whole of the settled land if the whole was subject to incumbrances; and where a part only was incumbered, to mortgage that part only. The testator's declaration in the will itself does not give the power. But if the Respondent has the power he must exercise it within the limits specified in sect. 53 of the *Settled Land Act*, 1882; he must "have regard to the interests of all parties entitled under the settlement;" and the Court, if it can see that he is acting without regard to, and in such a way as to prejudice, those interests, should interfere to restrain him from so acting. In the present case the proposed mortgage is clearly prejudicial to the interests of the annuitants. There is no reasonable chance, if the mortgage be effected, of keeping the estate in the family and carrying out the settlement made by the will. The proposed mortgage will benefit nobody except the mortgagees, and will only have the effect of postponing the sale of the property, which is inevitable at some time or other. In *In re Earl of Radnor's Will Trusts* (1) Lord *Esher*, M.R. (2), construes sect. 53. He says that a tenant for life is, by that section, put into the position of a trustee for himself and all the other parties, and he is bound to exercise his discretion as if he were an independent trustee for himself and all the other members of the family—that is, "as a fair and honest and careful trustee would under the circumstances; and the Court ought to view the matter precisely in the same light." In *In re Duke of Marlborough's Settlement* (3) the same view was taken by the Court of Appeal. It is submitted, therefore, that the learned Judge below was wrong in refusing to grant an injunction.

Sir *H. Davey*, Q.C. (*Macnaghten*, with him), for the Respondent:—

On the true construction of the will the tenant for life has

(1) 45 Ch. D. 402. (2) 45 Ch. D. 416, 417.
(3) 30 Ch. D. 127; 32 Ch. D. 1.

C. A.
1893
HAMPDEN
v.
EARL OF
BUCKINGHAMSHIRE.

power to mortgage the *Beechwoods* in order to pay off incumbrances on the rest of the *Buckinghamshire* estates. If that be not so, sect. 11 of the *Settled Land Act*, 1890, clearly gives that power.

It is submitted that the Court has no jurisdiction to interfere with the exercise of the power, unless it is shewn that the tenant for life is acting with a want of good faith, or that his conduct is arbitrary or capricious. Sect. 53 of the *Settled Land Act*, 1882, gives no such jurisdiction. When the tenant for life has honestly come to a decision whether he will sell or mortgage, it is only the mode in which he carries out his decision with which the Court has jurisdiction to interfere. The Legislature intended to leave the discretion as to whether a certain sum should be raised by sale or mortgage to the tenant for life; he is made master of the settlement. The words in sect. 53, "shall have regard to the interests of all parties entitled under the settlement," mean that he must have regard to his own interest as tenant for life, and the interests of his children and grandchildren, as well as of annuitants. Suppose there is a conflict of interest between the beneficiaries under the settlement, and he decides that a particular course is more in accordance with what the settlor wished, can it be said that the Court has power to interfere with that exercise of his discretion? In the present case, the Respondent has exercised his discretion as to whether money to pay off incumbrancers should be raised by sale of his family estates or by mortgage. It is not suggested that he is acting otherwise than with perfect honesty and *bona fides*. He is entitled to consider how the estates may best be preserved for those entitled under the settlement to enjoy them, in accordance with the testator's wishes. He is also entitled to consider his earldom, and its historical connection with *Buckinghamshire*, and that his ancient family seat is in that county, and all the other surrounding circumstances. He is not bound to give the claims of the annuitants a preference in exercising his discretion, and the Court ought not to interfere with the decision he has arrived at.

Birrell, in reply.

1893. April 24. LINDLEY, L.J. (after stating that the judgment he was about to read was the judgment of the Court (*Lindley*, *Bowen*, and *Lopes*, L.JJ.), continued as follows):—

This is an appeal from the refusal of Mr. Justice *Kekewich* to restrain the tenant for life of some settled estates from exercising his alleged power of mortgaging them under the authority said to be conferred upon him by sect. 11 of the *Settled Land Act*, 1890. The Appellants are annuitants whose annuities are charged on the whole of the settled estates, and they contend that their interests are in danger of being sacrificed in order that the settled estates may be preserved for the benefit of other persons. The Appellants urge that, by virtue of sect. 53 of the *Settled Land Act*, 1882, the tenant for life is a trustee for them as well as for the other persons claiming under the settlement, and that the proposed mortgage will be a breach of trust on the part of the tenant for life, and ought to be restrained accordingly. In order to decide the question thus raised, it is necessary first of all to ascertain the exact position of affairs and the rights of the several persons interested in the property proposed to be mortgaged. The late Earl of *Buckingham* was entitled to estates in *Ireland*, and also to estates in *Buckinghamshire*. He had mortgaged his Irish estates for £28,000, and the bulk, but not the whole, of his *Buckinghamshire* estates for £39,000. Part of his *Buckinghamshire* estates called "*Beechwoods*" was not mortgaged, and this part, equally with all the rest of his estates, he charged with annuities when he made his will. But, although *Beechwoods* was not comprised in any mortgage, the mortgagees, as specialty creditors of the testator, could have recourse to these lands for payment of their debts, if the testator's personal estate and the property comprised in their mortgage were insufficient to pay them, as I understand they were. It must therefore be borne in mind that, although the mortgages did not comprise *Beechwoods*, yet the payment of the annuities charged, *inter alia*, on *Beechwoods* was liable to be defeated, or at least delayed, by the mortgagees. By the will to which I have referred the testator bequeathed certain sums to his younger children, and charged them both on his Irish estates and on his *Buckinghamshire* estates, which expression includes *Beechwoods*, and

C. A.
1893
HAMPDEN
v.
EARL OF
BUCKINGHAMSHIRE.

he gave the annuitants powers of distress and entry. He bequeathed part of his personal estate to trustees, to go as heirlooms with his *Buckinghamshire* estates. He declared that all charges and incumbrances which should affect his Irish or *Buckinghamshire* estates respectively should be primarily charged on, and paid out of, such estates respectively in exoneration of his general estate and effects. He then devised his Irish estates and his *Buckinghamshire* estates in strict settlement in the usual way. He devised and bequeathed his residuary estate to trustees upon trusts for his younger children. He gave his trustees power to sell his Irish estates for the purpose of paying off any incumbrances on his *Buckinghamshire* estates. Such is a general outline of the will. The testator does not mention *Beechwoods* in his will. He treats those lands as part of his *Buckinghamshire* estates. As regards his mortgage debts, his general idea is that the Irish estates shall, or at least may, be sold for the preservation of the *Buckinghamshire* estates, and that these shall indemnify the general personal estate from all mortgages on them. The will contains various other provisions, which, however, are not material for the present purpose. By his codicil he bequeathed pecuniary legacies to a considerable amount. On his death his personal estate amounted to £28,000. In an action for the administration of his estate, the mortgagees both of the Irish and of the *Buckinghamshire* estates proved in respect of their debts. By these proofs the whole of the personal estate was exhausted. The mortgage on the Irish estates was, if I understand rightly, paid off in full. But £15,000 and interest still remains due to the mortgagees of the *Buckinghamshire* estates, and they can require the whole of those estates, including *Beechwoods*, if necessary, to be sold for their payment; and if *Beechwoods* is sold, these mortgagees, as between themselves and the annuitants, will be entitled to be paid, out of the proceeds of sale, in priority to any claims of the annuitants. The tenant for life proposes to mortgage all the *Buckinghamshire* estates, including *Beechwoods*, for £40,000, and not only to pay off what is still due to the mortgagees, but also to pay the pecuniary legatees, who have been deprived, by the mortgagees, of the personal estate out of which alone the legacies

were payable. As between the mortgagees and the legatees, and as between the legatees and the devisees of the mortgaged estates in *Buckinghamshire*, the legatees are entitled to stand in the place of the mortgagees to the extent to which they have been paid out of the personal estate. This is so by virtue of *Locke King's Act*, independently of the will. But the will itself directs that the *Buckinghamshire* estates shall bear the mortgages upon them in exoneration of the testator's general estate. This direction is ambiguous, but is very important in the present case. Does it mean that all the *Buckinghamshire* estates, including the unmortgaged *Beechwoods*, are to exonerate the testator's general estate; or does it mean no more than that the mortgaged estates in *Buckinghamshire* shall bear their own mortgage debts in exoneration of the general estate? If construed in the latter sense, the direction would be unnecessary by reason of *Locke King's Act*. I am of opinion that the testator meant much more than to express what would be implied in the absence of the clause in question. Having regard to the definition of *Buckinghamshire* estates in the will, and to the general scope of the will to which I have already alluded, I am of opinion that this direction charges the mortgages on *Beechwoods* for the purpose of exonerating the general estate, by which is obviously meant the real and personal estate not specifically disposed of by the will. This clause, therefore, entitles the pecuniary legatees to stand in the place of the mortgagees, not only as against the mortgaged property, but as against *Beechwoods* also. But I agree with Mr. *Warmington's* contention that the charge on the *Buckinghamshire* estates, including *Beechwoods*, is only for the purpose of exonerating the general estate, and does not affect the right of the annuitants, as between themselves and the devisees of the mortgaged estates, to have the mortgage debts paid out of these estates in priority to *Becchwoods*. Attempts have been made to sell the Irish estates so as to relieve the *Buckinghamshire* estates; but these attempts have not yet proved successful. The legatees have the conduct of these proceedings.

In November, 1891, an order was made by consent to raise £40,000 by mortgage of the *Buckinghamshire* estates; but, as

C. A.
1893
HAMPDEN
v.
EARL OF
BUCKINGHAMSHIRE

to *Beechwoods*, subject to the annuities charged upon it. But attempts to raise money on these terms have failed, and on the 2nd of November, 1892, an order was made for a sale of the *Buckinghamshire* estates; but the order was not to be drawn up for a month. It has, however, since been drawn up; but a sale under it has been postponed, as the present Earl, the tenant for life, proposes to raise £40,000 by mortgage of the *Buckinghamshire* estates, including *Beechwoods*, but so as to override and not be subject to the charge on them in favour of the annuitants. This mortgage the Appellants seek to restrain. A sale of the mortgaged estates apart from *Beechwoods* cannot be effected; and, if it could, it would not yield enough to pay off the mortgagees and the pecuniary legatees. Since the case was argued the Court has been furnished with evidence of the saleable value of the *Buckinghamshire* estates. That value is put at £80,000. No purchaser at that, or any other price, has yet come forward; but a sale at that price would be much more beneficial to the annuitants than a mortgage for £40,000, which should override their annuities. Such being the rights of the parties and the position of affairs, it becomes necessary to consider (1.) Whether the tenant for life has any power to make the proposed mortgage, apart from the question whether to make it will be a breach of trust. (2.) If he has such power, ought this Court to restrain him from exercising it upon the ground that its exercise would be a breach of trust? The first question turns on the true construction of sects. 2, 3, and 11 of the *Settled Land Act*, 1890, and sects. 2 (sub-sects. 1, 3, 4), 20, and 21 of the *Settled Land Act*, 1882. It was contended by counsel for the Appellants that the tenant for life had no power to mortgage the whole property to pay off an incumbrance upon part of it. This contention cannot, however, be supported. The settlement in this case is the will of the late Earl of *Buckinghamshire*, dated the 31st of October, 1877. The testator and settlor died in October, 1885, and by sect. 2, sub-sect. 1, of the *Settled Land Act*, 1882, the will, although made before the Act came into operation, is a settlement within the meaning of the Act. The settled land is all the land settled by that will, including *Beechwoods*, on which the Appellants' annuities are charged (see sect. 2, sub-sect. 3, of

the last-mentioned Act). The tenant for life under that settlement is the present Earl of *Buckinghamshire* (sect. 2, sub-sect. 5). He is tenant for life of the whole of the property comprised in the will, although the annuities of the Appellants are a first charge under the settlement on part of the land of which the Earl is tenant for life. The proposed mortgage is for the purpose of raising money in order to pay off an incumbrance on part of the settled land, and is warranted by sect. 11 of the *Settled Land Act*, 1890. The incumbrance consists of the mortgage debt on the mortgaged *Buckinghamshire* estates, including so much of it as has been paid off at the expense of the pecuniary legatees. Even if the will had not charged this mortgage debt on *Beechwoods*, the 11th section expressly authorizes the mortgage of the whole of a settled estate in order to pay off an incumbrance on part of it only. The money raised will be capital money for the purpose of paying off the incumbrance, and by sects. 20 and 21 of the *Settled Land Act*, 1882, the mortgage, when executed, will take priority over the annuities, and over all other charges and estates created by the settlement in the late Earl's will. Apart, therefore, from the question whether to create the mortgage will be to commit a breach of trust, it is, in my opinion, clear that the tenant for life can exercise the power to mortgage. The order for sale already made having been suspended does not, in my opinion, deprive him of this power. It was decided in *Cardigan* v. *Curzon-Howe* (1) that a tenant for life could sell notwithstanding a decree for the execution of the trusts of the settlement, and this goes far to shew that a suspended order for sale ought not to deprive the tenant for life of the power to mortgage conferred upon him by the statute.

It remains to consider whether the tenant for life can properly exercise this power, having regard to sect. 53 of the *Settled Land Act*, 1882. Upon this point I felt considerable doubt until the evidence as to the value of the *Buckinghamshire* estates was furnished to the Court. But this evidence satisfies me that the proposed mortgage will be unjust to them; and that justice to them requires that no such mortgage shall be made—at least,

(1) 30 Ch. D. 531.

C. A.
1893
HAMPDEN
v.
EARL OF
BUCKINGHAMSHIRE.

until it has been ascertained that no sale at a proper price can be effected. It was forcibly contended by Sir *Horace Davey* that it was for the tenant for life, and not for this Court, to determine what ought to be done; and that, so long as the tenant for life was acting *bonâ fide*, the Court ought not properly to interfere with him. Speaking generally, I think this is true. But, assuming a tenant for life to be acting *bonâ fide* and with a view to preserve the estates for those intended by the settlor to enjoy them, still an honest trustee may fail to see that he is acting unjustly towards those whose interests he is bound to consider and to protect; and, if he is so acting, and the Court can see it although he cannot, it is in my opinion the duty of the Court to interfere. It must be borne in mind that the effect of a sale under the *Settled Land Act* is merely to substitute money for land, and whatever rights persons had in the land are preserved to them in the money produced by its sale. But a mortgage which overrides an incumbrance has a very different effect. The incumbrancer's rights are *pro tanto* destroyed, not preserved, unless he is paid off out of the money raised by the overriding mortgage. In this case it is not proposed to pay off the annuitants out of the money to be raised by the mortgage, nor could the annuitants be so paid off even if the tenant for life desired it: see sect. 11, sub-sect. 2, of the *Settled Land Act*, 1890. In my opinion a tenant for life is not justified in trying to preserve a heavily incumbered estate by mortgaging it, if he thereby sacrifices the interest of existing incumbrancers upon it. The appeal, therefore, must be allowed. The order appealed from must be discharged, and an injunction be granted restraining the Earl of *Buckinghamshire* from mortgaging *Beechwoods* otherwise than subject to the rights of the persons entitled to the annuities charged thereon by the will of the settlor.

Solicitors for Appellants: *Stevens, Bawtree, & Stevens.*
Solicitors for Respondent: *Cookson, Wainewright & Co.*

W. A.

WILLIS *v.* EARL HOWE.

C. A.
1893
April 20, 24.

[1892 W. 2668.]

Statute of Limitations (3 & 4 *Will.* 4, *c.* 27), *s.* 26—*Concealed Fraud—Time when Right of Action accrues—Striking out Pleadings—Frivolous Action.*

The Plaintiff brought an action of ejectment in 1892, and alleged by his statement of claim that he was the heir-at-law of *W. J.*, who died intestate in 1798, and that on his death his real estate was wrongfully taken possession of by the mother of *G. C.*, an infant, in his name under the false pretence that *G. C.* was the heir-at-law of *W. J.*; that *G. C.* died an infant, and that his mother continued to hold possession of the estate in the name of *R. C.*, an infant, whom she falsely asserted to be the brother of *G. C.*, but who was really a supposititious child; that *R. C.* held possession of the estates after he came of age, and that he and his successors in title, including the Defendant, fraudulently concealed these facts from the true heir of *W. J.*; that the Plaintiff and his predecessors in title had been deprived of the estates by such concealed fraud, and that the same could not with reasonable diligence be discovered before 1879, when they became partially known; that the Plaintiff was an infant at that time, and did not attain his majority till 1887. The Defendant moved to have the statement of claim struck out as frivolous and vexatious, and filed an affidavit shewing that the story of *R. C.* being a supposititious child was publicly spoken of in newspapers and otherwise as early as 1853, and had been made the ground of previous unsuccessful actions of other claimants against the Defendant and his predecessors:—

Held (affirming the decision of *Kekewich*, J.), that the allegations in the statement of claim as to the entry in 1798 on behalf of *G. C.* did not shew a case of concealed fraud within sect. 26 of the 3 & 4 Will. 4, c. 27, but only a wrongful entry under a false claim; that the statute began to run against the Plaintiff's predecessors in title in 1798, and that as the possession had been adverse to the Plaintiff and his predecessors ever since, the operation of the statute had not been suspended by the alleged fraud in 1805; and that the Plaintiff or his predecessors might with reasonable diligence have discovered the concealed fraud, if any, more than twelve years before the commencement of the action. On these grounds the statement of claim was struck out, and the action was dismissed as frivolous and vexatious.

Lawrance v. *Lord Norreys* (1) followed.

Trustees, Executors, and Agency Company v. *Short* (2) distinguished.

THIS was an appeal from a judgment of Mr. Justice *Kekewich* dismissing the Plaintiff's action as frivolous and vexatious.

(1) 15 App. Cas. 210. (2) 13 App. Cas. 793.

C. A.
1893
WILLIS
v.
EARL HOWE.

William Jennens died in the year 1798, a bachelor and intestate as to his real estates, which were of great value.

This action was brought by *Benjamin Willis* against Earl *Howe*, who was in possession of the estates, claiming to be entitled to them as the true heir-at-law of *W. Jennens*.

The statement of claim contained the following allegations:—Par. 5: That some time after the death of *W. Jennens*, Lady *Sophia Curzon* (afterwards Baroness *Howe*), wrongfully took possession of his real estates in the name and on behalf of her infant son, *George Augustus William Curzon*, as heir-at-law, as she falsely alleged, of *W. Jennens*, and that on the death of *George A. W. Curzon* during his infancy in 1805, she continued to hold possession of the estates in the name and on behalf of a supposititious child called *Richard William Penn Curzon*, then an infant of nine years, on the false pretence that he was a younger brother of *George A. W. Curzon*, and as such the heir-at-law of *W. Jennens*, whereas in truth he was the illegitimate child of one *Ann Oakes*, a spinster. Par. 6: That *Richard W. P. Curzon* took possession of the said estates on attaining his majority in 1817, and remained in possession during his life, although he was well aware of the facts stated in par. 5; but he fraudulently concealed such facts from the heir-at-law of *W. Jennens*, and kept them concealed during his lifetime; that *George A. W. Curzon* was not the true heir-at-law of *W. Jennens*, the true heir being one *W. Jennens*, an ancestor of the Plaintiff, who died in 1803. The statement of claim then alleged that *Richard W. P. Curzon* was created Baron *Howe* in 1821, and that his sons, the second Baron *Howe* and the present Defendant, succeeded to the estates, and that they all knew the facts stated in par. 5, but fraudulently concealed them from the true heir.

Par. 11 was as follows: "The facts in paragraph 5 were concealed and kept secret fraudulently by the contrivance of the Defendant and his father and brother, with the intention of depriving the Plaintiff and his predecessors in title of the said real estates; and to further effect the said intention the Defendant, and his father and brother respectively, at various times prior to the year 1859, and subsequently down to the year 1879, did alter the inscription on the family monument in *Acton*

Church by additions to such inscription and erasures therefrom so as to conceal the said fraud.

The Plaintiff then alleged that the facts were only partially discovered in 1879, in consequence of a communication made by the daughter of the said *Ann Oakes* to an uncle of the Plaintiff. He then stated his pedigree from *W. Jennens*, and alleged that he was an infant in 1879, and did not attain his majority till 1887, and had only recently obtained proof of the facts alleged. He claimed a declaration that he was entitled to the estates and an account of mesne profits.

The Defendant, without delivering a statement of defence, moved before Mr. Justice *Kekewich* to take the statement of claim off the file as not disclosing any reasonable cause of action, and to dismiss the action as frivolous and vexatious. In support of his application an affidavit was filed by the solicitor of the *Howe* family, shewing that the allegation that *Richard Curzon*, first Lord *Howe*, was the illegitimate child of *Ann Oakes* had been publicly made in newspapers and other books as long ago as 1853, and had been the foundation of more than one unsuccessful action against the Defendant and his predecessors in title (1).

Mr. Justice *Kekewich*, on the hearing of the Defendant's application, made an order that the statement of claim should be struck out and the action dismissed as frivolous and vexatious. From this decision the Plaintiff appealed.

Winch, Q.C., and *Stuart Colquhoun*, for the Appellant:—

The operation of the *Statute of Limitations* is excluded, if there is concealed fraud: 3 & 4 Will. 4, c. 27, s. 26 (2). The Plaintiff here alleges concealed fraud on the part of the Defendant and his predecessors in title, and gives the par-

(1) See *Willis* v. *Earl Howe*, 29 W. R. 70.

(2) Sect. 26, as far as is material, is as follows: "That in every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered."

C. A.
1893
WILLIS
v.
EARL HOWE.

ticulars of such fraud, shewing that it was concealed by each person who took possession of the estate in succession: *Vane* v. *Vane* (1). *Richard Curzon*, according to the Plaintiff's allegation, was not really the brother of *George*; his entry, therefore, was a fresh departure, and the fact that the statute had begun to run in *George's* life is immaterial.

[KAY, L.J., referred to *Trustees, Executors, and Agency Company* v. *Short* (2).]

George had not acquired a statutory title at his death, and the operation of the statute has been suspended by the concealed fraud ever since *Richard's* entry. If the statement of claim is defective, an opportunity for amending it ought to be allowed, and the action not dismissed at once.

Warmington, Q.C., and *Ingle Joyce*, for the Defendant:—

The statute began to run when possession was taken in the name of *George Curzon*. There was no fraud or concealment in that. His possession may have been wrongful, but it was not fraudulent. If there has been any fraud since that time, the Plaintiff's predecessors were not dispossessed by it, for they were out of possession before. The fraud, if any, might have been discovered with reasonable diligence long ago; for the story about the supposititious child was discussed in the public prints in 1853, and has been made the foundation of previous unsuccessful suits: *Petre* v. *Petre* (3); *Lawrance* v. *Lord Norreys* (4); *Rains* v. *Buxton* (5).

Stuart Colquhoun, in reply.

April 24. 1893. LINDLEY, L.J. (after referring to the allegations in the statement of claim set forth above, continued as follows):—

The question is whether this action ought to be allowed to go on, bearing in mind the fact that this property has been held adversely to the Plaintiff and his predecessors in title ever since

(1) Law Rep. 8 Ch. 383.
(2) 13 App. Cas. 793.
(3) 1 Drew. 371.
(4) 15 App. Cas. 210.
(5) 14 Ch. D. 537.

1798. In order to decide that question we must carefully examine the language of the 26th section of the 3 & 4 Will. 4, c. 27. [His Lordship read the section.] That section has been much discussed in several cases which were referred to in the argument, particularly in *Petre* v. *Petre* (1), *Rains* v. *Buxton* (2), *Lawrance* v. *Lord Norreys* (3), and *Vane* v. *Vane* (4). These cases shew that in an action under this section the plaintiff must make out, first, that there has been concealed fraud; secondly, that he and his predecessors in title have been deprived of the land by such fraud; and, thirdly, that the fraud had not been discovered and could not with reasonable diligence have been discovered within the period ordinarily allowed by the statute for bringing an action for the recovery of land, which is now twelve years before action brought. Applying to this case the principle laid down by the noble Lords who delivered their opinions in *Lawrance* v. *Lord Norreys*, it appears to me that the Plaintiff does not bring himself within the section. Lord *Herschell* says (5): "Where an action is thus brought, on a title which accrued more than seventy years ago, to dispossess those who, or whose predecessors, have been in possession during that length of time, it is obvious that the allegations by which it is sought to prevent the statute being a bar need to be closely scrutinized. I will first call attention to what a plaintiff must prove in order to oust the ordinary operation of the statute. The Act says: 'In every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered.' It is not enough, therefore, to prove a concealed fraud; the person bringing the suit must shew that he or some person through whom he claims has been by such fraud deprived of the land which he seeks to recover, and that the fraud could not with reasonable diligence have been known or discovered more than

(1) 1 Drew. 371.
(2) 14 Ch. D. 537.
(3) 15 App. Cas. 210.
(4) Law Rep. 8 Ch. 383.
(5) 15 App. Cas. 213.

C. A.
1893
WILLIS
v.
EARL HOWE.
Lindley, L J.

the statutory period before the action was brought." And Lord *Watson* says (1): "But it is not any and every fraud which will elide the provisions of the statute, and keep alive a right of action for recovery of the lands. In order to constitute a fraud which will have that effect these statutory requirements must be fulfilled. In the first place, it must be a fraud which has deprived the plaintiff of his land; and, in the second place, it must be a concealed fraud, in this sense, that it was not only unknown to the plaintiff, and to those through whom he derives right, but could not, with reasonable diligence, have been discovered by him or them before the commencement of the twelve years immediately preceding the institution of his suit."

Apply this to the present case, and see what really deprived the Plaintiff and his predecessors in title of the land. It was what was done in 1798, when the Baroness *Howe* is said to have wrongfully taken possession in favour of her son *George*. There was no fraud in that and no concealment. She put in a person who was not entitled, that is all. It may have been a wrongful act in respect of which a cause of action arose, and from that time the statutory period of limitation would begin to run, and there has been continuous possession ever since. This is not like the case of the *Trustees, Executors, and Agency Company* v. *Short* (2), in which some person had been in possession for a few years, but not long enough to acquire a title, and then no one had been in possession at all, but the land was left vacant. It was there held that the rightful owner was in the same position in which he was before the intrusion took place. Here the Baroness took possession in 1798, and what took place in 1805 did not deprive the Plaintiff and those through whom he claims—still less was he deprived by the alleged tampering with the monumental inscriptions. The expression "concealed fraud" has been very much discussed, and it is difficult to say distinctly whether it simply means a fraud which cannot be discovered even if reasonable diligence be used, or whether it must be a fraud actually concealed by means of some falsehood or further fraud. But, whichever may be the meaning, this statement of claim does not allege any fraud in 1798; it alleges only a wrongful trespass.

(1) 15 App. Cas. 220. (2) 13 App. Cas. 793.

It does not even say that the Baroness knew that her son *George* was not the true heir. This is a short answer to the Plaintiff's claim. But when we look at the affidavit filed by the Defendant's solicitor, Mr. *Trower*—and it has been settled that an application of this kind may be supported by affidavits—it is obvious that this is a most hopeless action. The story about the supposititious child has been circulated since 1853, and the Plaintiff's predecessors in title might have discovered the fraud long ago, if fraud there was, without any difficulty. The action is utterly hopeless and without foundation, and I therefore think Mr. Justice *Kekewich* was right in not allowing it to go on. The appeal must, therefore, be dismissed with costs.

BOWEN, L.J., concurred.

KAY, L.J.:—

The Plaintiff claims a large estate of which he alleges his predecessors in title were deprived in the latter end of last century. He attempts to avoid the effect of the long adverse possession of more than ninety years by alleging that the case comes under sect. 26 of the 3 & 4 Will. 4, c. 27. He tries to make out that he was so deprived by a concealed fraud. To bring a case within that section four circumstances must concur: (1.) There must have been a fraud. (2.) That fraud must have deprived the claimant or his predecessors in title of the estate. (3.) Such fraud must have been concealed. (4.) The concealment further must have been such that it could not with reasonable diligence have been discovered sooner than it was in fact discovered, and, of course, such discovery must have been within twelve years before the commencement of the action.

Every one must see the reasonableness of what is stated by the present Lord Chancellor in *Lawrance* v. *Lord Norreys* (1), to the effect that in case of a claim after a very long adverse possession the statements in the claimant's pleading must be closely scrutinized.

In this case the first wrongful act which deprived the Plaintiff's predecessors in title of the estate is alleged to be the entry upon

(1) 15 App. Cas. 213.

C. A.
1893
WILLIS
v.
EARL HOWE.
Kay, L.J.

that estate by Lady *Sophia Curzon* (afterwards Baroness *Howe*) on behalf of her infant son *George*, whom "she falsely alleged" to be heir of the deceased owner, *William Jennens*. It is not stated that she knew the allegation to be untrue. But assuming such knowledge to be implied by the use of the word "falsely," the allegation would not amount to more than this, that a person took possession as heir knowing that he was not heir. Is a false assertion of title by a person so taking possession a concealed fraud within the meaning of the section? If so, it must follow that every entry upon land under a claim of title which the person entering knows he could not support would be a concealed fraud within sect. 26. I do not think that this is the meaning of the section. No case has gone so far. Vice-Chancellor *Kindersley*, in *Petre* v. *Petre* (1) says: "What is meant by concealed fraud? It does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold." That is not an exhaustive definition, and perhaps none could easily be given of the meaning of "concealed fraud." It is not merely an "unknown fraud." But the word "concealed" seems to indicate that there were facts known to the person who enters, and designedly concealed by him from the real owner, which facts, if known, would enable the real owner to recover. The deprivation of which the section speaks in such a case is by the fraudulent entry. But that which makes a wrongful entry fraudulent is not only the knowledge, but the concealment of those facts. If they had been disclosed, and the person who disclosed them had nevertheless entered, the entry would have been wrongful; but would it have been fraudulent? The section seems to point to some contrivance by which the real owner has not merely been deprived, but defrauded, in the sense of being induced to believe that he was not owner, and that the person who so entered was owner and entitled to enter. The case on which the pleader really relies is not the first entry on behalf of the son *George*, but the continuance of possession by

(1) 1 Drew. 397.

Lady *Sophia Curzon* after the death of *George*, an infant, on behalf of her alleged second son *Richard*. It is stated that he was not really the son of Lady *Sophia Curzon*, being the illegitimate child of one *Ann Oakes*, but that she passed him off as such and continued the possession on his behalf, and that when he attained twenty-one he, knowing all the facts, took possession, and that such possession has since been continued by persons claiming as volunteers under him.

This is much more like a case of concealed fraud. The personation by *Richard* of the position of brother of *George*, and the concealment of the fact that he was not such brother, and the taking possession by him in that character, might bring the case within the section: see *Vane* v. *Vane* (1). But this, according to the allegation, was not the fraud that deprived the Plaintiff's ancestor of possession. He had been deprived some years before by the entry of *George*, and his right first accrued under sect. 2 of the statute, when an entry was made in the name and on behalf of *George*. Unless that entry brought the case within sect. 26, the subsequent fraud, by which the possession was continued by the supposititious brother of *George*, would not suspend the operation of the statute, which began to run when the entry was made on behalf of *George*. It was suggested in reply that, as the alleged brother was not really the brother of *George*, his taking possession formed a new departure, and that the statute would begin to run from that entry, and that the previous possession of *George* was not material. The effect of that would be that if a series of occupiers, not claiming under one another, kept out the real owner for 100 years, time would only run against him from the moment when the last of such occupiers entered into possession. I am of opinion that this is not the law. A continuous adverse possession for the statutory period, though by a succession of persons not claiming under one another, does, in my opinion, bar the true owner. I desired to consider the case to which I referred during this part of the argument, but which was not then before the Court, the *Trustees, Executors, and Agency Company* v. *Short* (2). In that case there had been an adverse possession of land for some time short of the

(1) Law Rep. 8 Ch. 383. (2) 13 App. Cas. 793.

C. A.
1893
WILLIS
v.
EARL HOWE.
Kay, L.J.

statutory period, which was then abandoned, and the land left vacant, and after the statutory period had elapsed, but within twenty years before the plaintiffs' action, the defendant, or his predecessor in title, took possession. The law is thus stated in the language of Lord *Macnaghten* (1): "If a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant." These observations were made in a case in which, as I have already noticed, the defendant or his predecessors had not been in possession for the statutory period. If his defence could prevail, it would be enough for a man who entered the day before the action brought to say that the true owner had left the possession vacant for more than twelve years. But it was not meant that if the possession had not been vacant, but some one or other had been in adverse possession during the twelve years, such possession would not bar the true owner, unless all such occupants could shew a title derived from one another.

An affidavit has been filed on behalf of the Defendant, as the practice allows, to shew that this action is frivolous and vexatious. According to that affidavit, the foundation of the Plaintiff's case —viz., that *Richard* was not the brother of *George*, but was the illegitimate son of *Ann Oakes*—has been publicly alleged again and again for many years. It has been the ground of more than one action by claimants of this estate, who have failed. It has

(1) 13 App. Cas. 798.

been published in newspapers and in a book which has been produced. Therefore, there has been no new discovery of this fact. The Plaintiff and his predecessors in title knew, or with reasonable diligence might have known, all that he now alleges.

I am of opinion that, on the Plaintiff's statement in his pleadings, time began to run against his predecessor in title on the entry of Lady *Sophia Curzon* on behalf of her son *George*, and that nothing which is alleged alters the fact that the right of the Plaintiff's predecessor first accrued at that time. Even if that were not so, I think it is plain that the Plaintiff or his predecessors knew, or might with reasonable diligence have known, all that is here alleged as to the concealed fraud which is put forward as the ground of his claim, and that this action is frivolous and vexatious, and therefore the appeal must be dismissed with costs.

Solicitor for Plaintiff: *N. Moody.*
Solicitors for Defendant: *Trower, Freeling, & Parkin.*

M. W.

POWELL *v.* LONDON AND PROVINCIAL BANK.

C. A.
1893
May 3, 4.

[1891 P. 1550.]

Company—Stock—Transfer in Blank—Legal Title—Presumption of Redelivery—Registration—Breach of Trust—Notice—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16), *ss.* 14, 15.

The sole executor and residuary legatee of the surviving trustee of a marriage settlement was the registered holder of a sum of stock of a company regulated by the *Companies Clauses Consolidation Act*, 1845, which was part of the trust fund. He deposited with a bank as security for an advance the stock certificate, a loan note undertaking to execute a proper assignment when required, and a blank transfer executed by himself. This transfer was not stamped and was expressed to be in consideration of 5*s*. The bank, who had no notice of the trust, subsequently inserted their own name in the blank transfer and executed it; but the deed was not redelivered by the borrower, nor executed in his presence, nor by his authority under seal. The transfer was duly registered by the company, of which the bank informed the borrower:—

Held (affirming the decision of *Wright*, J.), that the transfer was not the

C. A.
1893
POWELL
v.
LONDON AND PROVINCIAL BANK.

deed of the borrower and did not pass the legal title to the stock; and, therefore, although the bank were not affected with notice of the breach of trust, their title must be postponed to the prior equitable title of the persons interested under the trust.

Semble, the fact that the blank transfer was not stamped and did not state the true consideration would not in itself have invalidated the deed, the provisions on that subject in the Act being merely directory.

THIS was an appeal from a judgment of Mr. Justice *Wright* (1).

The facts, which are stated more fully in the previous report, were shortly as follows:—

The Plaintiffs *H. St. J.* and *H. L. Powell* were the existing trustees of a marriage settlement under which the Plaintiff *Elizabeth Lawrence*, was entitled to a life income of the trust moneys. Part of the trust moneys consisted of a sum of £1000 stock of the *Penarth Harbour Dock and Railway Company*, a company regulated by the *Companies Clauses Act*, 1845, now standing in the name of the Defendants, the *London and Provincial Bank*.

The stock was formerly invested in the names of two trustees of the settlement, *Edmund Butler Edwards* and *Walter Powell*. *W. Powell* died in 1881, and from that date the stock stood in the sole name of *E. B. Edwards* without any notice appearing of the trust, and the company issued a certificate to him. *E. B. Edwards* died on the 9th of November, 1884, having by his will appointed his son *Martin Edwards* his executor together with another person, who did not prove the will. The will did not mention the stock, nor refer to the settlement or to any trust. *M. Edwards*, on the 16th of December, 1885, sent to the *Penarth Harbour Dock and Railway Company* the probate of the will and the certificate, and proper entries of the probate, and of the name of *M. Edwards* as executor, were made in the register and indorsed on the certificate.

In 1886, *M. Edwards* deposited the certificate with the Defendant bank to secure an overdraft, assuring the manager that he was absolute owner of the stock, and allowing him to inspect the probate of the will. He also deposited a loan note in the usual form, undertaking to execute a transfer of the stock when called on. At the same time he deposited a blank transfer signed and sealed by him purporting to transfer the £1000 stock in con-

(1) [1893] 1 Ch. 610.

sideration of 5*s.*; but the transfer was not stamped nor did it contain the name of the bank or any person as transferee.

The bank made large advances on the credit of this deposit, which *M. Edwards* failed to repay; and on the 9th of August, 1887, the bank wrote to him giving him notice that unless the money was repaid they would procure registration of the stock in their own name. On the 27th of August they wrote again, telling him that the transfer would be sent for registration on the following day.

On the 2nd of September, the bank filled in the blanks in the transfer by inserting their own name and sent it in for registration, and they became the registered owners of the stock. The transfer was not re-executed by *M. Edwards*, nor did he give the bank any authority under seal to execute or act upon the blank transfer, nor was it executed in his presence. The bank received the dividends and carried them to *M. Edwards's* account, of which they gave him notice. He never objected to the transfer, and in December, 1889, he authorized the bank to sell the stock upon certain conditions; but the stock was not in fact sold.

During all this time *M. Edwards* prevented inquiry by paying the interest on the stock to the Plaintiff *Elizabeth Lawrence* by his own cheques. At length he absconded, and the facts became fully known early in 1891.

In May, 1891, the Plaintiffs, *H. St. J. Powell* and *H. L. Powell*, were appointed trustees of the settlement. The Plaintiffs claimed a declaration that the *London and Provincial Bank* held the stock in trust for the Plaintiffs, the trustees of the settlement, and an order upon the bank to transfer the stock to them and to account for the dividends received since the transfer to the bank. The trustee in bankruptcy of *M. Edwards* was added as a Defendant to the action.

Mr. Justice *Wright* held that the bank was not affected with notice of *M. Edwards's* fraud; but that the transfer to the bank was invalid and did not pass the legal interest in the stock, and consequently that the bank, having only an equitable charge, must be postponed to the prior equity of the Plaintiffs.

The Defendants, the *London and Provincial Bank*, appealed from this judgment.

C. A.
1893
POWELL
v.
LONDON AND PROVINCIAL BANK

The appeal was heard on the 3rd of May, 1893.

Sir *H. Davey*, Q.C., and *R. F. Norton*, for the Appellants:—

The learned Judge decided in our favour on the question of notice of the breach of trust, and therefore the only point which it is necessary to argue on this appeal is whether the transfer to the bank was a good deed and passed the legal interest in the stock to the Defendants.

Admitting that the original execution of the blank transfer was not sufficient, we say that there was sufficient execution and redelivery by him afterwards, when the deed was executed by the bank. It is not necessary that delivery of a deed should be made by any manual act, it is sufficient if the party executing should shew by his conduct that he acknowledges it as his deed and desires it to be acted on: *Goodright* v. *Straphan* (1); *Hudson* v. *Revett* (2); *Tupper* v. *Foulkes* (3). In the present case the blank transfer was given to the bank in order that they might fill in the blanks and act upon it, and the grantor was informed of the execution by the bank and of the registration of the deed both before and after it took place, and he acquiesced in and acknowledged it: *Société Générale de Paris* v. *Walker* (4) is distinguishable, for there was in that case no evidence of subsequent acknowledgment by the grantor of the execution of the deed. The bank were agents of the grantor to redeliver the deed.

[KAY, L.J.:—The grantor could not redeliver the deed by an agent unless the agent was appointed by deed. That was decided in *Hibblewhite* v. *M'Morine* (5).]

Not in an ordinary case; but we rely on his conduct, by which he acknowledged the act of his agent. There is enough to justify a jury in presuming that the deed had been redelivered, and the Judge ought so to have held to meet the justice of the case. It is not an inflexible rule that an agent for delivery of a deed must be by authority under seal: *Shepherd's* Touchstone (6). An escrow

(1) 1 Cowp. 201.
(2) 5 Bing. 368.
(3) 9 C. B. (N.S.) 797, 801.
(4) 11 App. Cas. 20; 14 Q. B. D. 424.
(5) 6 M. & W. 200.
(6) Page 57.

is not delivered when it is executed, but it does not require a sealed authority to deliver it when the condition is performed. With respect to the objection that the blank transfer was not a deed within sect. 14 of the *Companies Clauses Act*, 1845, because it was not stamped, and did not state the true consideration, the provisions in the section in that respect are only directory and cannot prevent the transfer from being a valid deed. Moreover, we do not admit that the consideration was untruly stated. The equitable interest had already passed by the deposit and the loan note; the transfer was only of the legal title, the consideration for which was nominal.

Munns, for the trustee in *M. Edward's* bankruptcy.

Giffard, Q.C., and *Kenyon Parker*, for the Plaintiffs, were not called on.

LINDLEY, L.J.:—

This case is a very easy one to determine, when the facts are understood. It appears that on the 9th of November, 1884, £1000 in the *Penarth Harbour Dock and Railway Company* stock stood in the name of *Edmund Butler Edwards*. He was the surviving trustee of a settlement under which the Plaintiffs claim. He died on the 9th of November, 1884, and his sole executor was *Martin Edwards*, and he, being sole executor of *Edmund Butler Edwards*, could of course transfer this stock. He could either get it transferred into his own name, or he could do that which is commonly done, get the fact of his being executor indorsed on the old certificate, and have it transferred without registering himself. The stock of this particular company is governed by the *Companies Clauses Consolidation Act* (8 & 9 Vict, c. 16), and sect. 14 of that Act of Parliament is the one which relates to the transfers, and it enacts that every transfer of shares or stock shall be by deed duly stamped, in which the consideration shall be truly stated. Then sect. 15 provides that the deed of transfer (when duly executed) shall be delivered to the secretary and kept by him; and it is to be entered by him in the register of transfers. Then by sect. 18 there is provision

C. A.
1893
POWELL
v.
LONDON AND PROVINCIAL BANK.
Lindley, L J

made for the transmission of shares by other means than by a transfer, that is to say, to executors and so on; but there is nothing in the Act of Parliament which enables an executor to transfer otherwise than by a deed duly executed. I do not dwell upon the point of the stamp, nor upon that part of the Act which says that the consideration is to be duly stated. No case that I know of can be cited to shew that that part of the enactment is otherwise than directory. No case that I know of can be cited to shew that a misstated consideration or an erroneous stamp would invalidate the deed. But that it should be a deed is by the Act of Parliament essential, and in order to acquire the legal title to stock or shares in companies governed by the *Companies Clauses Consolidation Act* you must have a deed executed by the transferor, and you must have that transfer registered. Until you have got both you have not got the legal title in the transferee.

Now what took place here, was this: *M. Edwards* gave to the bank a transfer sealed by him, and, so far as form goes, probably delivered by him to the bank, but with blanks. It was not in a complete form. It was never in that form in which such an instrument, however much wax there might be at the bottom, could amount to a deed by the transferor. We all know that both at common law and under these statutes if you execute a transfer in blank that instrument with the blanks is not a deed. Then what happened was this. That document so executed by *Edwards* in blank was filled up afterwards by the bank, probably as was intended, and the bank itself was put in as the transferee, and the bank got itself registered. We have a copy of the certificate, and that was registered on the 2nd of September, 1887.

Now, stopping there for a moment, what was the effect of what had been done? It was not that the bank got a good title. The registration of the stock in the bank, unless preceded by a valid deed transferring the stock from the owner of it, does not give the transferee a good title at all. We have not to consider the effect of documents executed in blank as agreements enforceable in equity. We have nothing to do with that, but we are considering the legal title of the bank. The bank had no

legal title at all. If so, how did they get it afterwards? They say that afterwards *Martin Edwards* was informed that this transfer had been made to the bank, and he was told on the 27th of August that it would be sent in for registration, and he knew in the following March that he had credit for a dividend, and that the deed had been registered. So the defendants ask us to infer that he had executed the deed before it was registered. Can we do so? On what principle are we asked to draw such an inference in the teeth of the acts of the parties? It is said there is a doctrine about redelivery, that if a man executes a deed, that is to say, seals it, and then afterwards acknowledges it as his own, that will amount to a delivery. That may be true, and in the case in *Cowper's* Reports, *Goodright* v. *Straphan* (1), that doctrine was carried to a considerable length. But in that case there was no alteration at all. The first authority which has been cited in which there was an alteration is the case in *Bingham* of *Hudson* v. *Revett* (2). There the person who had sealed the deed knew what the alteration was. It was altered in his presence, and he knew exactly the state in which it was. Knowing the condition in which it was, he assented to it as his deed, and it was held that amounted to a redelivery. I follow that, but there is nothing of the sort here. There is not a particle of evidence to shew that *M. Edwards* ever knew how these blanks were filled up. He never saw the document, and it was never brought to his attention further than that he was told the transfer was sent in for registration. To ask us to infer that he acknowledged that deed which he never saw as his deed is asking us to do that which I for one cannot possibly do.

It is urged that a jury would say there had been a redelivery. I do not think that twelve men would do anything of the sort; and Mr. Justice *Wright* has come to the conclusion that there was no redelivery. I not only cannot differ from him, but I think the inference is correct.

I cannot part with the case without calling attention to what the consequence would be if we were to stretch our consciences and decide in favour of the bank. We should be driving a

(1) 1 Cowp. 201. (2) 5 Bing. 368.

C. A.
1893
POWELL
v.
LONDON AND PROVINCIAL BANK.
Lindley, L.J.

coach and four through this Act of Parliament. Bearing in mind how common these transfers in blank are, we should reduce to a nullity that clause which requires transfers to be by deed, and we should enable transfers to be any instrument sealed or unsealed, and there would always be a conflict of evidence on the subject. We should in fact be repealing the Act of Parliament. The inference seems to me to be entirely against the evidence, and in my opinion the appeal must be dismissed with costs.

BOWEN, L.J.:—

I am of the same opinion. The bank seems to me to have no legal title, and that is the short point on which the case turns. This deed was executed in blank, and at the time when it was registered it had never passed back into the hands of the grantor. He had never seen it again, and it seems to me, therefore, it was not registered within sect. 15 of the *Companies Clauses Act*, which says that the deed of transfer when duly executed shall be delivered to the secretary to be registered. I cannot see how that objection can be got over, and I do not myself think that any argument has been offered to us which in the slightest degree tends to get over it. As a matter of fact, it seems to me that the deed never was, as against the parties to this suit, the deed of the grantor. A deed, in order to be a deed, must be sealed and delivered, and although we have heard a very ingenious argument which seems to rest on the assumption that a deed can be a deed before it is delivered, I never heard of it before. The sealing and delivery are essential parts of a deed. When was this deed ever delivered as a deed? At the time of its supposed delivery it was in blank. When was it redelivered, if at all? The redelivery must be done by the grantor or by somebody who acts for him. The grantor in this case never saw the deed again. He did not himself redeliver it. Then it is said he may have so conducted himself as to preclude himself from saying he has not redelivered, or so conducted himself as actually to have done that which in law amounts to redelivery. If a deed which has been executed in blank, and is not a deed at the time, comes back into the custody

of the person who originally sealed it, he can by his assent complete the delivery. That is the case of *Hudson* v. *Revett* (1), where the grantor of the deed knew of the alterations, and the blank was filled up in his presence. But it is said that even though the deed does not come back into his presence, the grantor may so conduct himself as that his conduct amounts to a redelivery. I should require to examine the cases very closely to see if that had ever been established at law. It is said that the case of *Goodright* v. *Straphan* (2) proves it; but I am by no means satisfied that in that case there was anything more than an estoppel which arose between the parties. But, at all events, if such an assent can amount to redelivery by a man who is a hundred miles away from the deed, one would have thought it must be an assent which brings home to his knowledge that which has been done to the deed, and the condition in which the deed is at the moment his assent is supposed to have been given. In this case there is nothing of the sort, and without accepting the proposition until I am able to give it further examination, it seems to me that the facts do not justify its application.

Then can it be said that if not redelivered by the grantor, it has been redelivered by some agent? An agent to deliver a deed must be an agent appointed under seal. I quite agree that here again the doctrine of estoppel may prevent the application of the leading principle. But estoppel here is out of the case. As to the doctrine that an agent can deliver for a principal without authority under seal, I can only say it seems to me a novel one. It is quite true that you may deliver a deed on a condition, and that when the condition is performed the performance of the condition effectuates the delivery; but that is by virtue of the original intention and act of the grantor. But apart from those cases where there is a conditional delivery or delivery to operate on the condition being performed, can it be true that an agent can deliver without any authority under seal? It cannot upon principle. It is well-known law that an agent cannot execute a deed, or do any part of the execution which makes it a deed, unless he is appointed under seal.

(1) 5 Bing. 368. (2) 1 Cowp. 201.

C. A.
1893
POWELL
v
LONDON AND PROVINCIAL BANK.
Bowen, L J.

Then, it is said that under these circumstances, although there are no acts in law which amount to redelivery, yet the learned Judge ought to have strained his conscience and found delivery to suit the justice of the case. If it is a question of a presumption which may be rebutted—of a presumption which would be left to a jury as a fact, no Judge is bound to strain his conscience and find that that has happened which never did happen. It seems to me the case of the Defendants utterly fails. I am sorry for the bank, but the loss must fall on somebody, and it must fall on those who have not the legal title.

KAY, L.J.:—

I am of the same opinion. In this case the Plaintiffs are the trustees and persons beneficially interested under a settlement, dated in 1867. The title of the bank, whether legal or equitable, was acquired very considerably after that, and therefore there is no question if their title is merely equitable that the Plaintiffs have an equity long prior in point of time.

But the bank say, "Admitting that the prior and superior equity is in the Plaintiffs, we have acquired without notice of that equity the legal interest in this stock, and having acquired the legal interest without notice, we plead that we are purchasers for value without notice, and this claim, that we should be considered as trustees of the stock for the benefit of the Plaintiffs, and should be ordered to transfer the stock to the Plaintiffs, fails, because we meet them with that plea." The essence of the case, therefore, is, Have they or have they not the legal interest? Being purchasers for value without notice, they cannot succeed, unless they can make out that having an inferior equity they have clothed it with a legal interest. All that depends on the question whether this deed of transfer has been duly executed by the grantor, the dishonest executor of the surviving trustee of the settlement who placed this transfer in the hands of the bank signing and sealing the transfer, leaving the consideration and the name of the grantee in blank. It is not denied that when the document was in that imperfect condition it was not an effective deed. But they say that it has become a deed by what happened afterwards, and that

what happened afterwards amounts to a redelivery. They state the law to be this—that even admitting that this deed was so imperfect at the time it was originally signed sealed and handed over to the bank; that it was not a deed at all, yet by what amounts to a redelivery of it after the bank had filled in their own names as transferees, and had filled in the consideration, it became a perfect deed. Of course, in order to make that out, it must be proved there was a redelivery, and the grounds on which the Defendants rely to make that out are these—not that they ever shewed the deed in its completed condition to the grantor who had signed and sealed it in its imperfect condition, for he never saw it afterwards; not that they told him how they filled in the blanks, for they never did tell him how they filled in the blanks, and he never knew; but they say this: "We told him we were going to register it, and therefore he must be taken to have understood that before we could do that the blanks would have to be filled in; we told him, also, we were going to register in the name of the bank, and therefore he must be taken to have understood that the bank intended to fill in their own name as transferees; and then afterwards we informed him we had registered, and we told him that we, the bank, had received the dividends, and proposed to credit him with the amount so received"; and afterwards, at a later period, again, he having had this information which he seems to have treated with silence all along, he told the bank to sell the stock. Therefore it is said you must infer—what? You must infer that he knew how the deed had been filled up; that he assented to that filling up, that he assented to the registration which took place after the filling up, and that, accordingly, he by that assent put himself into such a position that the proper inference is that he redelivered that deed. Certainly no case has been cited which goes so far as that. It is perfectly idle to say he ever made the bank his agents to redeliver the deed for him. I absolutely dissent from the argument that such an agent can be appointed without deed. I have already referred to the judgment of Mr. Baron *Parke* in *Hibblewhite* v. *M'Morine* (1). I will read a part of it again. He was dealing with a similar document, which,

(1) 6 M. & W. 200.

C. A.
1893
POWELL
v.
LONDON AND
PROVINCIAL
BANK.
Kay, L.J.

when it was sealed and delivered, had the name of the vendee in blank, and therefore he says was void. But he says (1): "Assuming, then, the instrument to be a deed, it was wholly improper, if the name of the vendee was left out; and to allow it to be afterwards filled up by an agent appointed by parol, and then delivered in the absence of the principal, as a deed, would be a violation of the principle, that an attorney to execute and deliver a deed for another must himself be appointed by deed." Therefore it could not possibly be maintained, that the bank had authority to deliver this deed on behalf of the grantor.

But it is said even if they had not it must be inferred from the facts I have stated that the grantor himself assented to that deed in such a form and in such a manner that it amounted to a redelivery. This is the argument that has been addressed to us: "A delivery need not be by a physical act; the man who delivers it need not take it into his own hands and say, 'I deliver this to you'; he may say when he has signed and sealed the deed, which may be in the next room, 'There is my deed which I have signed and sealed: go and take it up'"; and it is said that will amount to a delivery. I do not deny that under such circumstances the acts might amount to a delivery; but no case has ever decided that because a man knew that people had been acting on a blank deed as if it were a perfect deed it must therefore be inferred that he knew that the deed was filled up, that he knew how it was filled up, and that he must be taken to have redelivered it. That is carrying the doctrine far beyond any case that can be referred to.

Then as to the registration of the bank as holders of this stock. In the case of *France* v. *Clark* (2) it was decided most distinctly by Lord *Selborne* that the registration where the deed itself is incomplete does not perfect the title of the transferee. He says (3): "He cannot, by his own subsequent act, alter the legal character, or enlarge in his own favour the legal or equitable operation, of the instrument. This, in our opinion, renders it unnecessary to consider whether, before the registration was completed, the company and the appellant had notice of the plaintiff's

(1) 6 M. & W. 214. (2) 26 Ch. D. 257.
(3) 26 Ch. D. 262.

claim; for registration in the name of a transferee only gives complete effect to a prior valid transfer; registration does not make effectual a document which was, as between the legal transferor and transferee, inoperative and of no effect." Therefore, in order to make out their defence that they are legal owners, the Defendants must shew, not merely that there was a registration, but that the deed which was registered was a perfect deed at the time it was registered. Otherwise the registration does not help their case. I think the evidence falls short of what would be requisite to enable any jury or judge to find that this was a completed deed or that there ever had been anything like re-delivery.

Accordingly I think the appeal fails, and must be dismissed with costs.

Solicitors: *Thomas White & Sons; Munns & Longden.*

M. W.

PAINE & CO. *v.* DANIELLS AND SONS' BREWERIES. *In re* PAINE & CO.'S TRADE-MARKS.

C. A.
1893
April 12, 13, 14; *May* 9.

[1891 P. 2345.]

Trade-mark—Passing off Goods as those of another Trader — User by other Persons of Distinctive Words in a Trade-mark at the time when the Mark is Registered—Motion to Expunge or Rectify Trade-mark—Injunction—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 90.

In 1879 the Plaintiffs registered as a trade-mark for beer a figure of *John Bull*, with the words "*John Bull Brand*" round his head and shoulders, and in 1886 a mark consisting of the former with some additions. The Plaintiffs' trade was mainly an export trade. In 1879, *L. & Co.*, a firm in *Sheffield*, were selling "*John Bull Beer*," but their trade was purely local, and the Plaintiffs did not know of it. In 1890 this firm finally abandoned the use of the words "*John Bull.*" In 1884 the Defendants, who brewed beer for the home market, registered at *Stationers' Hall* a trade-mark for beer very similar to that of the Plaintiffs, and containing the words "*John Bull, Registered.*" In 1885 they applied to register it as a trade-mark; but the Plaintiffs opposed, and the application was refused. The Defendants, however, continued to sell beer under the above mark. The Plaintiffs in 1891, as soon as they became aware of the use of this mark by the Defendants, commenced an action to restrain them from infringing the Plaintiffs' trade-marks, and from passing off their beer as

C. A.
1893
PAINE & Co.
v.
DANIELLS AND SONS' BREWERIES.
In re PAINE & Co.'s TRADE-MARKS.

that of the Plaintiffs by the use of any labels so like those of the Plaintiffs as to be calculated to deceive. It appeared that the Defendants did not know of the Plaintiffs' trade-marks when they first began to use their own. The Defendants moved to expunge the words "*John Bull*" from the Plaintiffs' trade-mark :—

Held, by *Kekewich*, J., that the use of the words "*John Bull*" by the *Sheffield* firm at the time when the Plaintiffs' mark was registered would, if known to the Comptroller, have prevented the registration, and that the marks must be rectified by striking out "*John Bull Brand*"; that the Plaintiffs' trade-mark was not infringed, and that the action must be dismissed, as the Defendants were not using a mark calculated to pass off their goods as the goods of the Plaintiffs when the words "*John Bull*" were expunged from the Plaintiffs' mark.

Held, on appeal, that assuming that *L. & Co.* could in 1879 have successfully opposed the registration of the Plaintiffs' trade-mark, no one else had a right to oppose; and that as *L. & Co.* had not opposed, and had subsequently abandoned the use of the words "*John Bull*" before these proceedings, the Court ought not to interfere with the Plaintiffs' trade-mark, which was not, as in *Thompson* v. *Montgomery* (1), a mark of such a nature that it could not be registered as a trade-mark.

The principles on which the Court exercises the discretion conferred on it by the *Patents, Designs, and Trade Marks Act*, 1883, as to removing a mark from the register, considered :—

Held, further, that the Defendants' label was an infringement of the Plaintiffs' right, and that the Plaintiffs were entitled to an injunction.

THE Plaintiffs, who were brewers at *St. Neots, Huntingdonshire*, registered in 1879 a trade-mark, No. 20,352, consisting of a representation of a stout gentleman in top-boots standing with his hands in his pockets with the words "*John Bull Brand*" round the head and shoulders. In 1885 they registered as a trade-mark, No. 49,412, the words "*John Bull Brand.*" In 1886 they registered another trade-mark, No. 53,522, for bottled beer, in which the same figure as the first with the words "*John Bull Brand*" round the head and shoulders was enclosed in an oval, other words being added outside the oval. In the same year they registered another label for bottled beer, No. 53,523, in which a stout gentleman in top-boots was shewn in a cellar with a bottle in one hand and a glass in the other, but the words "*John Bull*" did not appear. The Plaintiffs had a considerable export trade in bottled beer to *Australia*, though their trade in this country was small, and their beer and ale was known to their customers as "*John Bull*" beer and ale.

(1) 41 Ch. D. 35; [1891] A. C. 217.

The Defendants, who were brewers at *Colchester*, had in 1884 registered at *Stationers' Hall* a trade-mark containing the words "*John Bull.*" In 1885 they applied to register it as a trade-mark. The registration was opposed by the Plaintiffs and was refused. The Defendants, however, continued to use this mark, which was a label with a picture of *John Bull* sitting on a cask with a jug and glass on a table beside him and a bull-terrier at his feet, and under the picture were the words "*John Bull, Registered.*"

The Defendants sold their ale chiefly in the Eastern Counties, and the businesses of the Plaintiffs and Defendants did not come into competition until they both began to sell beer in the north of *London.* The Plaintiffs then became aware of the use of the Defendants' label, and upon discovering it they in October, 1891, commenced this action against the Defendants to restrain them from infringing the above trade-marks and from passing off their beer as the Plaintiffs' beer by using signs, labels, or printed papers in connection with the sale or bottling of beer having such resemblance to those of the Plaintiffs as to be calculated to deceive.

On the 6th of February, 1892, the Defendants gave notice of motion to expunge the Plaintiffs' four trade-marks, or as to No. 20,352 and No. 53,522 to rectify them by adding a note disclaiming any exclusive right to the use of the words "*John Bull*": on the ground that No. 49,412 ought not to have been admitted to registration, and that the Plaintiffs were not entitled to the exclusive use of any of the other marks.

On the 16th of March, 1892, an order was made by Mr. Justice *Kekewich* expunging the trade-mark No. 49,412 and reserving the rest of the motion.

The action came on for trial on the 6th of December, 1892. On the third day of the trial a telegram from *Sheffield* was received by the Judge, stating that at the time when the Plaintiffs' marks were registered a firm of *Lofthouse & Bell* in *Sheffield* were selling ale under the name of "*John Bull*" ale. The case was adjourned that this matter might be investigated.

The result of the investigation was that in 1879, when the Plaintiffs' first trade-mark was registered, *Lofthouse & Bell* had

C. A.
1893
PAINE & CO.
v.
DANIELLS AND SONS' BREWERIES.
In re PAINE & CO.'S TRADE-MARKS.

from 1875 been selling at *Sheffield* and in its immediate neighbourhood strong beer as "*John Bull*" beer. This fact was unknown to all parties concerned in this litigation until it was disclosed by the above telegram. *Lofthouse & Bell* used these words as a description of the article they sold, but did not register them as a trade-mark, nor add them to any registered mark. They went on using them till 1890, when they sold their business, and from that time the words were never used by them or their successors in business.

The motion as to the remaining trade-marks was heard at the same time. Mr. Justice *Kekewich* considered that the use of the words "*John Bull*" by the *Sheffield* firm made it impossible for the Plaintiffs to establish any exclusive title to the use of them, and that if such user had been brought to the attention of the Comptroller he would not have allowed the Plaintiffs' marks to be registered as they stood. His Lordship dismissed the action, and ordered the Register of Trade Marks to be rectified by expunging the words "*John Bull Brand*" from the trade-marks Nos. 20,352 and 53,522.

The Plaintiffs appealed.

Sir *H. Davey*, Q.C., *Warmington*, Q.C., and *Israel Davis*, for the appeal:—

Apart from all questions of trade-mark, we claim an injunction on the ground that no man has a right to pass off his goods as made by another. Here the Defendants are attempting to deceive, and that there is a distinction between the marks, which is obvious when you see them side by side, does not prove that the use of the latter one may not be restrained. It is enough if the latter mark is sufficiently like the other to be taken for it by a person who does not minutely examine them: *Mitchell* v. *Henry* (1), which related to threads running through a white selvedge. Sir *George Jessel* there said that when you looked at the two marks side by side there was no resemblance, and that there was no infringement. On appeal (2), Lord Justice *James* said: "The question resolves itself into the old question, which has always been the question to be determined in these cases—

(1) 15 Ch. D. 181.

(2) 15 Ch. D. 190, 193.

are the defendants, not in words, but by acts, and by something on the face of their goods, representing their goods as being the goods of the plaintiffs—that is to say, are they using some mark which is calculated to pass off their goods as the goods of the plaintiffs?" And Lord Justice *Cotton* said: "In my opinion the Act in no way interferes with the exercise by a Court of Equity of its old jurisdiction." The principle of this case was strongly carried out in *Read* v. *Richardson* (1), and in *Johnston* v. *Orr Ewing* (2). Lord *Selborne* lays it down that the fact that there appears a considerable difference between two trade-marks when laid side by side does not preclude infringement of one by the other. We claim an injunction on the ground that the Defendants are passing off their goods as ours by selling them under a title known as ours. Mr. Justice *Kekewich* thought that the user of the term "*John Bull*" by *Lofthouse & Bell* at *Sheffield* at the time we adopted it debarred us from complaining; but there was only a local and temporary use of the words "*John Bull*" by others, and the Plaintiffs did not know of such use. It is not necessary for us to shew that we have an exclusive right to use the words. Others may have a right also, and we might not be able to restrain them from using them; but that does not excuse the Defendants. They must shew that they have a right themselves. It is not necessary for us to shew that the Defendants have an intention to deceive; it is enough if we shew that the Defendants' mark is calculated to deceive the public: *Reddaway* v. *Bentham Hemp Spinning Company* (3); *Dunnachie* v. *Young* (4); *Ford* v. *Foster* (5); *Wotherspoon* v. *Currie* (6); *Thompson* v. *Montgomery* (7).

With respect to the validity of our trade-mark, we were entitled to the exclusive use of the words "*John Bull.*" The *Sheffield* firm had no trade-mark, nor did they use the words as a label on their bottles. If they could have objected to the registration at the time, the Defendants have no such right. The mark is now valid against all the world. The words are distinctive

(1) 45 L. T. (N.S.) 54.
(2) 7 App. Cas. 219.
(3) [1892] 2 Q. B. 639; 9 Rep. Pat. Cas. 503.
(4) 10 Ct. Sess. Cas. 4th Series, 874.
(5) Law Rep. 7 Ch. 611.
(6) Ibid. 5 H. L. 508.
(7) 41 Ch. D. 35; [1891] A. C. 217.

C. A.
1893
PAINE & CO. v. DANIELLS AND SONS' BREWERIES.
In re PAINE & CO.'S TRADE-MARKS.

within the meaning of the Act of 1883 (46 & 47 Vict. c. 57), s. 64, sub-s. I. cl. (*c*): *In re Dunn's Trade-marks* (1). They correctly describe the particular goods and the name under which they are sold. If the Defendants had any objection to the registration of our mark, they ought to have used promptness in making it. As long ago as 1885, the Defendants applied to register "*John Bull*" as their trade-mark, and it was refused because of the previous registration of our mark. They ought to have moved then to take our trade-mark off the register: *In re Atkins' Trade-mark* (2); *In re Hyde & Co.'s Trade-mark* (3).

Renshaw, Q.C., *Hopkinson*, Q.C., and *Ingle Joyce*, for the Respondents:—

With respect to the tendency to deceive: when the Defendants began to use the words "*John Bull*," the Plaintiffs had no real user of the words in this country, nor have they now. Nearly all their beer is exported to *Australia*. In *England* they have no trade except in the north of *London* and at *St. Neots*. When our predecessors adopted the words "*John Bull*" they knew nothing of the Plaintiffs' use of them. We have never imitated the Plaintiffs' mark, or endeavoured to pass our goods as theirs, nor is there any instance proved of customers being deceived, and the name of "*John Bull*" was not so generally associated with these goods as to make our use of it amount to a representation that our goods were theirs. Therefore, they are not entitled to an injunction against us: *McAndrew* v. *Bassett* (4); *Goodfellow* v. *Prince* (5).

The registration of the Plaintiffs' trade-mark was invalid. They had not the exclusive right to it. The effect of the 6th section of the Act of 1875 (38 & 39 Vict. c. 91) and of the 73rd section of the Act of 1883 (46 & 47 Vict. c. 57) is that no trade-mark can be registered unless the owner has a right to the exclusive use; otherwise the trade-mark would be calculated to deceive the public. Our not objecting at an earlier period can make no difference. It cannot make that legal which was illegal.

(1) 41 Ch. D. 439; 15 App. Cas. 252.
(2) 3 Rep. Pat. Cas. 164.
(3) 7 Ch. D. 724.
(4) 4 D. J. & S. 380, 384.
(5) 35 Ch. D. 9.

We should not have sought now to expunge the words "*John Bull*" from the Plaintiffs' trade-marks if they had not claimed to appropriate those words so that no other English firm could use them. The Defendants are now aggrieved persons because the carrying on of their trade is interfered with. Sir *H. Davey* says, that if the Plaintiffs are not entitled to have these words on their label no words can be allowed on any label, and on the strict construction of sect. 6 of the Act of 1875, and sect. 73 of the Act of 1883, that may be right. Probably, however, the sections ought to be considered as in *In re Hudson's Trade-marks* (1) to allow some descriptive words; but here "*John Bull*" is the essential part of the trade-mark.

Then as to the case of fraud, we do not come within *Thompson* v. *Montgomery* (2). In that case the plaintiffs had for a long period brewed at *Stone* ale which was very extensively known as "*Stone Ale.*" The defendant went to *Stone* and set up a brewery there that he might be able to sell his ale as "*Stone Ale.*" There was a fraudulent intention to pass off his goods as those of the plaintiffs. In *Reddaway* v. *Bentham Hemp Spinning Company* (3), it was held that the issues should be whether the words used had acquired in the trade the meaning of an article made by the plaintiffs, and if so, whether the use of the words by the defendant was likely to induce purchasers to suppose that his articles were made by the plaintiffs. The Plaintiffs' reputation in the places where we trade is non-existent; so it is clear that our use of the words "*John Bull*" cannot lead our purchasers to suppose they are purchasing the Plaintiffs' goods; if we went into the Australian trade the Plaintiffs might have more to say. We began the use of the words in ignorance of the Plaintiffs' trade-mark, which entirely distinguishes the case from *Johnston* v. *Orr Ewing* (4).

[BOWEN, L.J.:—Has it ever been decided that innocent inception is a defence? The inception was innocent in *Millington* v. *Fox* (5).]

We do not say that it is a complete defence, but it is an

(1) 3 Rep. Pat. Cas. 155.
(2) 41 Ch. D. 35; [1891] A. C. 217.
(3) [1892] 2 Q. B. 639.
(4) 7 App. Cas. 219.
(5) 3 My. & Cr. 338, 352.

C. A.
1893
PAINE & Co. v. DANIELLS AND SONS' BREWERIES.
In re PAINE & Co.'s TRADE-MARKS.

element to be considered. Where a mark is adopted with a fraudulent intention the Court will be ready to consider that it is calculated to deceive; but if no fraudulent intention is shewn the Court will not be ready to assume that the mark is calculated to deceive, if it be substantially different from the other mark, which is the case here.

Lapse of time was dealt with in *Rodgers* v. *Rodgers* (1), which shews that the Court will give weight to long user by the defendant, and the law is substantially laid down in the same way in *In re Heaton's Trade-mark* (2). Long user is not an absolute bar, but has an important bearing on the second question in *Reddaway* v. *Bentham Hemp Spinning Company* (3).

Sir *H. Davey*, in reply:—

The Defendants represent themselves as commencing the use of their trade-mark innocently. I say that, however innocently they may have begun to use it, their continuance of its use was fraudulent under sect. 105 of the *Patents Act*, 1883; for though they had tried unsuccessfully to register their trade-mark, and had only registered it at *Stationers' Hall* which they must have known to amount to nothing, they use a label with the words "*John Bull, Registered*," which is an offence within the express terms of the section. Such user can never confer any right nor entitle the Defendants to complain of our laches in not having taken proceedings earlier. It is said that our home trade is small, and it is true that our trade is chiefly an export trade; but if this case goes against us they can at once proceed to export "*John Bull*" ale to the places with which we trade. It is true that it has been laid down that the Court ought to rectify improper entries in the register though the applicant has no merits: *Thompson* v. *Montgomery* (4); but under sect. 90 the jurisdiction is discretionary, and here it cannot be urged that our trade-mark is an improper one. The *Sheffield* firm might have had a right to object to it; but if they had used a registered trade-mark they might have assented to our being registered: *In re Walkden Aerated Waters Company's Application* (5), and as

(1) 31 L. T. (N.S.) 285.
(2) 27 Ch. D. 570, 576.
(3) [1892] 2 Q. B. 639.
(4) 41 Ch. D. 35, 50.
(5) 54 L. J. (Ch.) 394.

they never objected, and have since discontinued using the words "*John Bull*," no objection can be taken to those words now. I submit, then, that in the action an injunction ought to be granted on the common law ground of misleading, and on the statutory ground of our right to our trade-mark, and that our trade-marks ought not to be altered, the only persons who could complain of our use of the words "*John Bull*" never having objected to our using them, and having since ceased to use them.

1893. May 9. LINDLEY, L.J.:—

The Plaintiffs are, and have been for many years, brewers at *St. Neots*. Their trade, as regards the sale of beer in this country, is small and local; but they have a considerable export trade in bottled ale, and their beer and ale are known to their customers as "*John Bull*" beer and ale. They have certain trade-marks with "*John Bull*" on them, and to which I will refer presently. The Defendants are brewers in *Colchester*, and they and their predecessors in business have for some years brewed and sold ale and beer in the Eastern Counties as "*John Bull*" ale and beer. The Defendants have no export trade; but both Plaintiffs and Defendants sell their ale and beer in the north of *London*, and as their businesses expand they will probably come into competition with each other more than they have done at present. The Defendants have no registered trade-mark; but they, and their predecessors in business, have for about eight years used a label with a picture of what may be called *John Bull* sitting on a cask with a jug and glass of beer on a table by his side, and with a bull-terrier on the floor. Under this picture are the words, "*John Bull, Registered.*"

The Plaintiffs, having recently discovered the use by the Defendants of this label, have brought an action for an injunction to restrain the Defendants from infringing their trade-marks, and from passing off the ale and beer of the Defendants as the ale and beer of the Plaintiffs. This attack on the part of the Plaintiffs has been met by a motion by the Defendants to expunge the words "*John Bull*" from the Plaintiffs' trade-marks, and by a denial that the Defendants pass off their ale and beer as and for the ale and beer of the Plaintiffs. Mr. Justice *Kekewich*

C. A.
1893
PAINE & CO.
v.
DANIELLS AND SONS' BREWERIES.
In re PAINE & CO.'S TRADE-MARKS.
Lindley, L.J.

decided the controversies thus raised against the Plaintiffs. He decided that the Plaintiffs had no right to have "*John Bull*" on their labels, and he ordered the words "*John Bull Brand*" to be struck out of the Plaintiffs' trade-marks. He further decided that, apart from these words, there was no danger of the Defendants' beer being mistaken for that of the Plaintiffs'. From these decisions the Plaintiffs have appealed.

The history of the Plaintiffs' trade-marks, which are in question on this appeal, is as follows:—

On the 23rd of September, 1879, the Plaintiffs registered their trade-mark, No. 20,352, consisting of a fat man standing in top-boots, with both hands in his trousers pockets, and with the words "*John Bull Brand*" printed in a curve round his head and shoulders.

On the 6th of May, 1886, the Plaintiffs registered a label, No. 53,522, containing in its centre the above trade-mark and words, but with the words, "*Paine & Co.'s India Pale Ale, bottled expressly for exportation by Robert Porter & Co., London,*" round the centre, and with the words "*Trade Mark*" across the margin of the label.

The Plaintiffs had two other registered trade-marks. Of these, one consisted of the words "*John Bull Brand.*" The other, namely, No. 53,523, was without those words, but had a picture of what may be called *John Bull* standing in a cellar holding a bottle in one hand and glass of ale in the other. These two last-mentioned marks need not be further alluded to. The first of them was held bad by Mr. Justice *Kekewich*, and the Plaintiffs have not appealed from his order as to it. The other, viz., 53,523, has been left alone; it is not affected by the order appealed from, which is confined to Nos. 20,352 and 53,522.

The objection made to these trade-marks is that in 1879, when they were registered, some brewers at *Sheffield*, named *Lofthouse & Bell*, had sold and were selling strong beer as "*John Bull*" beer. This fact was unknown to the Plaintiffs and to everybody concerned in this litigation until it was nearly over. A Mr. *Ward* first mentioned it in a telegram to Mr. Justice *Kekewich*, who informed the parties of it. Mr. *Ward* and

Mr. *Lofthouse* were called as witnesses, and proved the use of the words "*John Bull*" by *Lofthouse & Bell* in their business, which was confined to *Sheffield* and its vicinity. They also proved that *Lofthouse & Bell* had had show-cards with "*John Bull*" on them. These words, however, did not accompany any picture and were not registered as a trade-mark, nor as an addition to any registered mark. The words were used by *Lofthouse & Bell* from about 1875 until 1890. In that year they sold their business, and since that time the words had not been used at all, either by themselves or by their successors in business.

Now I will assume that if *Lofthouse & Bell* had objected in 1879 to the words "*John Bull Brand*" in the mark then registered by the Plaintiffs, those words would not have been allowed on the register. I will also assume that if Messrs. *Lofthouse & Bell* had applied in proper time to have those words expunged from the register they would have succeeded in their application. But assuming all this, it is, in my opinion, clear that under the Act 38 & 39 Vict. c. 91, no one else had any right to complain of the use of those words by the Plaintiffs as additions to their trade-mark. The trade-mark was the picture of *John Bull*, but the words "*John Bull Brand*" might be added. [See sect. 10 and *In re Hudson's Trade-marks* (1), and *In re Atkins' Trade-mark* (2).]

It is all-important to bear in mind that this is not a case in which the Court is asked to expunge from the register a trade-mark which did not come within the statutory definition, and which, therefore, the Registrar had no power to register. This case is not like the case of *Thompson* v. *Montgomery* (3), where the Court struck off "*Stone Ale*" on the ground that those words were not a trade-mark and ought not, therefore, to be on the register as a trade-mark. The mark No. 20,352, registered in 1879, is free from all such objection, and the words "*John Bull Brand*" never having been complained of by the only persons who had any right to complain of them, the mark with them ought, in my opinion, to be allowed to stand unaltered.

The mark No. 53,522, registered in May, 1886, is only

(1) 3 Rep. Pat. Cas. 155. (2) 3 Rep. Pat. Cas. 164.
(3) 41 Ch. D. 35.

C. A.
1893
PAINE & Co.
v.
DANIELLS AND SONS' BREWERIES.
In re PAINE & Co.'s TRADE-MARKS.
Lindley, L.J.

objectionable to the Defendants inasmuch as it embodies the old trade-mark of 1879, and contains the words "*John Bull Brand*" round the figure of *John Bull*. To strike out the words in question from the later mark without striking them out from the first mark would, however, be an idle proceeding, and one which the Court could hardly be expected to take, having regard to the wide discretion conferred upon it by the 90th section of the Act of 1883, which is now in force.

Quite apart, therefore, from all considerations arising from the conduct of the Defendants, to which I shall refer presently, the Plaintiffs' marks Nos. 20,352 and 53,522 must be treated as duly registered trade-marks, with the lawful addition of the words "*John Bull Brand*," and the order of Mr. Justice *Kekewich*, directing the removal from the register of those words, must be reversed.

The next question is whether the Plaintiffs are entitled to any relief against the Defendants in respect of what they have done, or in respect of what they claim the right to do and threaten and intend to do in future. As regards the past, the Plaintiffs have not suffered any damage, nor do they ask for damages. But as regards the future, they claim to be entitled to an injunction, and, in my opinion, they are so entitled. Mr. Justice *Kekewich* thought otherwise, and if I had come to the same conclusion as he on the invalidity of the Plaintiffs' title to their trade-marks as registered, I should not have differed from him on the right of the Plaintiffs to relief in their action. Their right to such relief is, however, a necessary consequence of their right to their marks with the words "*John Bull Brand*" as registered.

To make this plain, it is necessary to advert to what the Defendants claim the right to do. The facts are very peculiar. The Defendants have, in my opinion, clearly proved that when their predecessors selected the design for their label they knew nothing whatever of the Plaintiffs' labels, and were quite ignorant of the fact that the Plaintiffs, or any one else, brewed and sold ale or beer known as "*John Bull*" ale or beer. Both the picture and the words "*John Bull*" selected for and approved by Messrs. *Daniell* were so selected and approved in perfect good faith, and without the slightest intention of passing their beer

off as the beer of the Plaintiffs, of whom, in fact, Messrs. *Daniell* had never heard. The label so selected and approved was intended to be registered, and no doubt as a trade-mark. The word "*Registered*" was ordered to be printed on the label, and this was done. The label was then sent to *London* for registration. This was in August or September, 1884. On the 13th of October, 1884, it was registered at *Stationers' Hall*, which, of course, was of no use. When Messrs. *Daniell* first used these labels in their business is not clear; but they used them in 1884 or 1885, and they and the Defendants have continued to use them ever since. Whether the Messrs. *Daniell* realized before the 12th of August, 1885, that they had no registered trade-mark I do not know; but on the 12th of August, 1885, they were distinctly informed that they had not; but as the label had been registered at *Stationers' Hall* the label was not discontinued, and the word "*Registered*" was kept on it as before.

Messrs. *Daniell*, having been informed that their label had not been registered as a trade-mark, gave instructions to have it so registered. Application was made accordingly; but their application was opposed by the Plaintiffs. In September, 1885, Messrs. *Daniell* learned the existence of the Plaintiffs' trade-marks. In consequence of the Plaintiffs' opposition the Defendants' label has never been registered as a trade-mark, nor has their picture been so registered without the words "*John Bull*," which the Messrs. *Daniell* offered to withdraw. Notwithstanding all this, the Messrs. *Daniell* have persisted in using their label, and the Defendants, who have bought their business, still persist in using it. Honestly as the Messrs. *Daniell* were acting when they first adopted their label, their conduct since September, 1885, admits of no excuse. Since that time, at all events, they first and their company afterwards have wilfully and persistently asserted themselves to be the owners of a registered trade-mark for beer, consisting of a picture of *John Bull* and with the words "*John Bull*" accompanying the picture; and the Defendants have done this knowing that they were not such owners and knowing that the Plaintiffs were the only persons on the register as owners of a trade-mark consisting of a picture of *John Bull*, with the words "*John Bull Brand*" underneath it. This conduct

C. A.
1893
PAINE & Co.
v.
DANIELLS AND SONS' BREWERIES.
In re PAINE & Co.'s TRADE-MARKS
Lindley, L.J.

on the part of the Defendants is, in my opinion, a distinct infringement of the rights of the Plaintiffs. The Defendants' label, with the word "*Registered*" on it, is a disparagement of the Plaintiffs' title to their mark and words as registered. The Defendants' combination of a picture of *John Bull* and the words "*John Bull*" underneath it, even without the word "*Registered*," is, in my opinion, an infringement of the Plaintiffs' right to a similar combination, and is calculated to mislead the public. I do not go the length of saying that the Plaintiffs are the only persons entitled to a picture of *John Bull* in connection with ale or beer, nor that they alone can put the words "*John Bull*" on bottles of ale or beer, for it may be possible to use these words and yet not mislead, though it will not be easy to do so. This is a case in which the Defendants' label must be taken as a whole, and, so taken, their label is, in my opinion, an infringement of the Plaintiffs' rights, and is calculated seriously to injure them in their business. It is true that there is no proof that as yet the Defendants' beer has ever been taken for the Plaintiffs' beer; but that may well be only because the business of the Defendants is as yet confined to the Eastern Counties and a small part of *London*. If the Defendants' business were to develop and they were not restrained from using their labels with the words "*John Bull, Registered*," upon them, I think that their mark probably would deceive the public and induce them to mistake the Defendants' beer for the Plaintiffs'. I come to this conclusion from the evidence and from the word "*Registered*," in conjunction with the picture of *John Bull* and the words "*John Bull*," all of which the Defendants persist in using.

It is unnecessary to consider what the Plaintiffs' rights would have been if the Defendants' conduct had been different from what it has been. But guided by the principles explained and acted upon in *Johnston* v. *Orr Ewing* (1), *Slazenger* v. *Feltham* (2), *Thompson* v. *Montgomery* (3), and *Reddaway* v. *Bentham Hemp Spinning Company* (4), the Plaintiffs are entitled to an injunction.

The Plaintiffs being thus successful are in my opinion entitled to the costs both here and below of their own action and of the

(1) 7 App. Cas. 219.
(2) 6 Rep. Pat. Cas. 531.
(3) 41 Ch. D. 35; [1891] A. C. 217.
(4) [1892] 2 Q. B. 644.

Defendants' application to rectify the register in respect of the marks Nos. 20,352 and 53,522.

The order of the Court therefore will be this: Discharge the order of the 1st of February, 1893, directing the rectification of the register in respect of the Plaintiffs' trade-marks, No. 20,352 and No. 53,522, with costs here and below. Reverse the judgment in the action so far as the same relates to the aforesaid trade-marks with costs here and below, and restrain the Defendants, their servants, and agents from using the label marked "*F*" in the labels referred to in the Plaintiffs' interrogatories—that is the label they are at present using—and from otherwise infringing the Plaintiffs' registered trade-marks aforesaid, and from doing any act calculated to pass off ale or beer made by the Defendants as ale or beer made by the Plaintiffs.

BOWEN, L.J.:—

The Plaintiffs are manufacturers of beer and the registered proprietors of (amongst others) two trade-marks, the consideration of which alone is material to this appeal. The first is a trade-mark of 1879, which consists of the picture of a man in top-boots and hands in his pockets, with an inscription round his shoulders and head, "*John Bull Brand.*" The second trade-mark is one of the year 1886, which is a development of the former. It contains as a centre the other trade-mark, but adds to it certain other words, including the Plaintiffs' own firm's name. The action is brought to obtain relief on two wholly separate and distinct grounds. The Plaintiffs, in the first place, allege that the Defendants, who are also manufacturers of beer, but who have no registered trade-mark, either have passed off, or at all events intend to pass off, their own beer as beer of the Plaintiffs' manufacture, and claim an injunction on that ground. In the second place, the Plaintiffs insist that their specific trade-marks are infringed.

The conduct of the Defendants which gives rise to the above complaints is as follows: They are manufacturers of beer, although in a different part of *England.* They have (as has already been stated) no registered trade-mark, but for some years they have been using in the sale of their bottled beer

C. A
1893
PAINE & Co.
v.
DANIELLS AND SONS' BREWERIES.
In re PAINE & Co.'s TRADE-MARKS.
BOWEN, L. J.

a label of a man, to whom the name of "*John Bull*" would not certainly be inappropriate, sitting on a cask with beer on a table beside him and a bull-terrier at his feet. Under the picture the Defendants place these words, "*John Bull, Registered.*" The Plaintiffs complain of this as being a fraud upon their rights at common law, and also as being an infringement of their specific trade-marks. On the other hand, the Defendants move to expunge from the Plaintiffs' trade-marks the words "*John Bull.*"

It is obvious that until the title of the Plaintiffs to retain these words "*John Bull*" as part and parcel of their own trade-marks is decided, it is impossible to ascertain the exact rights of the parties as regards the grievances complained of in the action. The learned Judge gave effect to the motion of the Defendants, expunged the words "*John Bull*" from the Plaintiffs' trade-marks, and, having done so, came as a natural logical consequence to the conclusion that the Plaintiffs, in respect of the alleged grievances, had nothing to complain of. Having no right to the words "*John Bull*" they could not prevent the use of such words by others.

The first and all-important matter to consider is, on what grounds the learned Judge deprived the Plaintiffs of this essential portion of their registered trade-mark, and set the Defendants at liberty to use it. He did so on the following grounds: At the time when the Plaintiffs, in 1879, were registering their first trade-mark, a *Sheffield* firm of the name of *Lofthouse & Bell*, unknown to the Plaintiffs, and to every one else concerned in this litigation, were, as a fact, selling beer as "*John Bull*" beer in *Sheffield* and the immediate neighbourhood, though without any registered trade-mark. This fact would, no doubt, have entitled the *Sheffield* firm, in 1879, to oppose, and, I will assume (though for the purpose of the case only), successfully oppose, the registration of the Plaintiffs' trade-mark, so far as regards the inscription "*John Bull Brand.*" The fact was unknown, as I have stated, to the Plaintiffs when they registered; and as the *Sheffield* firm, at the time of the present action and motion, had discontinued the sale of the beer and the use of the name in question, their user would probably have remained unknown had not somebody at *Sheffield*, conceiving the circumstance to be

material, telegraphed to the learned Judge in the middle of the trial. He thought the information important, and on its being verified he decided the litigation before him on the strength of it. He held that the use by the *Sheffield* firm of the trade term "*John Bull*" would, if it had been known, have prevented the registration by the Plaintiffs of their 1879 and 1886 trade-marks; and he rectified the register by the light of this view, striking off the term "*John Bull*" from the Plaintiffs' trade-mark. "*John Bull*" being gone from their trade-mark, it followed, in his opinion, that the use by the Defendants of the expression "*John Bull, Registered,*" was not an infringement of the Plaintiffs' trade-mark as rectified, and that there was no evidence on which he could grant an injunction against the Defendants to restrain them from passing off beer as beer of the Plaintiffs' manufacture.

The very use of the term "*John Bull*" beer by the *Sheffield* firm prior to the first trade-mark of the Plaintiffs' proves beyond doubt that the *Sheffield* firm could have opposed, and possibly successfully, the Plaintiffs' registration of that trade-mark. On the other hand, the *Sheffield* firm did not, as it happened, oppose it; and previously to the present motion to expunge the term "*John Bull*" the *Sheffield* firm have discontinued the manufacture of their "*John Bull*" beer.

The Defendants' application to expunge these words is made under sect. 90 of the Act of 1883, which confers upon the Court a plenary discretion in the matter—a discretion to be exercised no doubt upon judicial principles—but still, a discretion. Before determining in what manner and to what extent this discretion to rectify should be exercised, it may be necessary for the purposes of our decision to consider under what circumstances we are asked to make the rectification, and by whom the application to rectify is made.

The Defendants, by a coincidence which, although singular, is nevertheless on the evidence in the case proved to be innocent and free from suspicion of fraud, selected some years ago a design and picture for their own beer label which is not unlike that of the Plaintiffs'. The Defendants added to their label the words "*John Bull, Registered.*" To any ordinary mind this would convey, and must, I think, have been intended to convey, to the

C. A.
1893
PAINE & Co
v
DANIELLS AND SONS' BREWERIES
In re PAINE & Co's TRADE-MARKS
Bowen, L.J

minds of ordinary purchasers the impression that the Defendants had a registered trade-mark of which "*John Bull*" formed a part. This was and is absolutely untrue. The Defendants possess no such trade-mark nor any registered trade-mark at all. They did indeed register the so-called mark at *Stationers' Hall* on the 13th of October, 1884; but this was not the registration of a trade-mark, and could not honestly be represented as such. In September, 1885, the Defendants made an abortive attempt to register such a trade-mark—an attempt which was defeated by the opposition of the Plaintiffs, and it is proved up to the hilt that the Defendants at this date—if not before—became aware of the Plaintiffs' first trade-mark, which is now in question. Nevertheless, they continued (knowing that the Plaintiffs had a "*John Bull*" trade-mark and picture) to sell their beer as "*John Bull, Registered.*" From and after 1885 they must have known not merely that they were guilty of a misrepresentation, but that it was a misrepresentation which might injure the Plaintiffs. They nevertheless continued to put forward the misleading assertion. Have they, under these circumstances, a right to insist that the Plaintiffs' trade-mark should be rectified on the mere ground of the prior user by the *Sheffield* firm—a user existing in 1879, but now long since discontinued? This raises an important question of principle as to the lines on which the Court should act in exercising the discretion conferred upon it by sect. 90 of the Act of 1883.

The purity of the register of trade-marks—if one may use the expression—is of much importance to trade in general, quite apart from the merits or demerits of particular litigants. If on a motion like the present the attention of the Court is called to an entry on the register of a trade-mark which cannot in law be justified as a trade-mark, it seems to me that the Court's duty may well be, whatever the demerits of the applicant, to purify the register and to expunge the illegal entry in the interests of trade, as was done in the "*Stone Ale*" case. As a rule, the Court on being seised of the matter would doubtless put an end to the existence of a trade-mark which could not possibly be justified by law. But the matter is wholly different when the trade-mark complained of is one which is not in itself illegal or improper,

although at the date of registration its registration might have been, perhaps, successfully opposed by some third party who did not in fact oppose it. In such a case, the defect in the register is not a defect of which the law is bound to take cognizance at the instance of every complainant. Consent by the *Sheffield* company would, in the present case, have removed all difficulty in the way of the registration of the Plaintiffs' trade-mark. The Defendants have no right, as it appears to me, to take the point that such consent was not in fact shewn to have been given by the *Sheffield* firm, in order to displace a trade-mark which they have been meanwhile dishonestly infringing. I am of opinion that the Court is not bound under sect. 90 of the Act of 1883, on the application of an unmeritorious applicant, to displace an entry on the register, which, on the face of it, is not illegal, because the original registration might have been opposed on the ground of prior user by a third person who never opposed it on any such ground, and who, at the time of the motion to rectify, has discontinued his user.

The motion to expunge the words "*John Bull*" from the two trade-marks of the Plaintiffs ought accordingly, I think, to have failed, and not succeeded, before Mr. Justice *Kekewich*; and the Plaintiffs are entitled, on appeal, to have this portion of their trade-marks retained.

If this view be correct, it has a conclusive effect on the determination of the questions raised in the Plaintiffs' action. It is perfectly true that the present area of the Defendants' trade differs from that of the Plaintiffs', although in the north of *London* the two trades are beginning to overlap. It is equally true that there is no evidence of any customers of the Plaintiffs having been diverted or misled, as indeed there is no evidence that the Defendants are about to embark in the export trade, and to compete abroad with the Plaintiffs. But the fact remains that the Defendants not only appropriate part of a trade-mark, which, on the above view, belongs to the Plaintiffs, but actually emphasize their appropriation by a falsehood to the effect that theirs is a registered mark. The only registered "*John Bull*" mark belongs to the Plaintiffs; yet the Defendants sell their beer under the appellation of "*John Bull, Registered,*" and they

C. A.
1893
PAINE & Co.
v.
DANIELLS AND SONS' BREWERIES.
In re PAINE & Co.'s TRADE-MARKS.

do this knowing that the Plaintiffs have a registered "*John Bull*" mark. I think they must be ready, if not anxious, to appropriate to themselves the benefit of the Plaintiffs' registration for some purpose of their own, remote or immediate; and on this simple and plain ground I hold that the Plaintiffs in this action are entitled to an injunction to the extent to which, and framed in the terms which we have settled, and which will be found in my Brother *Lindley's* judgment.

KAY, L.J.:—

The Plaintiffs sue to restrain the Defendants from infringing certain registered trade-marks, and also to prevent them from passing off their beer as beer manufactured by the Plaintiffs. The Defendants move to expunge the Plaintiffs' trade-marks from the register.

It is convenient to deal first with the Defendants' motion. The learned Judge has altered the Plaintiffs' trade-marks as on the register by striking out from them the words "*John Bull.*" This he did under the discretionary power given to the Court by sect. 90 of the Act of 1883.

The evidence establishes that when the Plaintiffs adopted the representation of "*John Bull*" for their bottled beer, that name was not in general use for beer, nor indeed in use at all, except that from 1875 or 1876 to 1890 a firm of brewers at *Sheffield* used the name of "*John Bull*" for a strong ale brewed by them. Such use was confined to *Sheffield* and an area comprised within a radius of sixteen miles from that town. The Plaintiffs were entirely ignorant of such user. It came to an end by the abandonment of that name by the *Sheffield* firm in 1890.

There is no other evidence that the name was ever used for beer at the time when it was adopted by the Plaintiffs. They first, in 1879, registered a picture of a stout man in top-boots, standing with his hands in his pockets, with the words "*John Bull Brand.*" Their beer having this label became known as "*John Bull*" beer, and, in 1886, they put a label round the figure and added other words to the words "*John Bull,*" and registered this new label. Now at this time the *Sheffield* firm were still using the name "*John Bull.*" They had not registered

any label with that name. Undoubtedly, under sect. 90, the Court has a discretion as to expunging or altering a trade-mark. The learned Judge seems to have taken the view that, if the user of the name "*John Bull*" by the *Sheffield* firm had been made known to the Comptroller in 1879, he would not, or ought not, to have allowed the Plaintiffs to register a trade-mark containing those words. But, assuming that to be so, I do not think it necessarily follows that the words "*John Bull*" should now be expunged from their trade-marks.

As I am satisfied that these words were adopted by the Plaintiffs without any knowledge that they had been used as a designation of ale or beer by the *Sheffield* firm or any other persons—as there is no evidence that the Plaintiffs' use of them has ever misled any one, or was calculated to mislead—as the *Sheffield* firm abandoned the use of these words in 1890—I can see no objection to the Plaintiffs now retaining their trade-marks with these words upon them; and, therefore, exercising the discretion given to the Court by sect. 90, I do not think the Court should now order these words to be expunged from the Plaintiffs' trade-marks.

The Defendants have used and are using a label which has upon it a sitting figure with the words "*John Bull.*" It also has upon it the word "*Registered.*" They did apply for registration, but this was refused. They have, nevertheless, and notwithstanding that they have known for many months of the Plaintiffs' registered trade-marks, continued to use this label with the word "*Registered*" upon it. That is an untrue representation. If it means anything, it means that the Defendants are the owners of the registered trade-mark of "*John Bull*" for bottled beer. But the Plaintiffs are the only persons who own a registered trade-mark of that kind. Such a user by the Defendants, with the knowledge of the facts which they possessed, seems to me to be a fraudulent proceeding. The areas within which Plaintiffs and Defendants carry on their trade approach in the north of *London*, if they do not already overlap. I think that the Plaintiffs will most probably be damnified if this practice of the Defendants is continued. I think, therefore, that an injunction ought to be granted to prevent the Defendants using their present labels

C. A.
1893
PAINE & CO. v. DANIELLS AND SONS' BREWERIES.

which have the words "*John Bull*" and "*Registered*" upon them, and from in any other mode infringing the registered trade-mark of the Plaintiffs, and from doing any other act which may induce the public to believe that the ale or beer made by them is ale or beer of the Plaintiffs' manufacture.

In re PAINE & CO.'S TRADE-MARKS.

Israel Davis asked for a certificate under sect. 18 of the *Patents, Designs, and Trade Marks Act*, 1888.

LINDLEY, L.J.:—

I do not think it is a case for a certificate. This is a very peculiar case.

Solicitors: *Halses, Trustram & Co.; W. W. Palmer*, agent for *Goody & Son, Colchester.*

H. C. J.

C. A.
1892
KEKEWICH, J.
Nov. 1, 2, 3, 8, 9.
C. A.
1893
May 12, 15, 16.

RAPIER *v.* LONDON TRAMWAYS COMPANY.

[1892 R. 1228.]

Nuisance from Smell—Tramway Company—Stables—Statutory Powers—Noise—Abating Nuisance before Trial—Injunction—Damages.

The Defendants were a tramway company, who were empowered by their Act to lay down and construct two lines of tramway according to deposited plans, together with the works and conveniences connected therewith. The Act gave no compulsory powers for taking lands, and made no special mention of building stables. The Defendants constructed the lines, and built some large blocks of stables near the Plaintiff's house for the horses employed in drawing the cars. The Plaintiff complained of the smell caused by the stables, and brought an action for an injunction to restrain the Defendants from using the stables so as to cause a nuisance:—

Held (affirming the decision of *Kekewich*, J.), that although horses were necessary for the working of the tramways, the company were not justified by their statutory powers in using the stables so as to be a nuisance to their neighbours, and that it was no sufficient defence to say that they had taken all reasonable care to prevent it.

THE *London Tramways Company, Limited*, was registered under the provisions of the *Companies Acts*, 1862 and 1867, and obtained further powers under the *London Tramways Company, Limited, Purchase Act*, 1873. By the *London Tramways Company, Limited (Various Powers), Act*, 1888 (51 & 52 Vict. c. cxliv.), the company

was empowered to make certain lines of tramway called the *Clapham*, *Balham*, and *Tooting* lines.

The 4th section of that Act was as follows: "Subject to the provisions of this Act, and of Parts II. and III. of the *Tramways Act*, 1870, the company may make, form, lay down, work, use, and maintain in the county of *Surrey* the tramways hereinafter described in the lines and according to the levels shewn on the deposited plans and sections, and in all respects in accordance with those plans and sections, with all proper rails, plates, works, and conveniences connected therewith." The tramways authorized consisted of three lines of six, five, and four furlongs respectively.

Sect. 24: "The company may, subject to the provisions of this Act, and with the consent of the local and road authority, from time to time make, maintain, alter, and remove such crossings, passing-places, sidings, junctions, and other works in addition to those particularly specified in and authorized by this Act, as they find necessary or convenient for the efficient working of the tramways, or for providing access to any warehouses, stables, or carriage-houses or works of the company."

The Act gave no compulsory powers for taking lands, and limited the time for the completion of the works to two years. In pursuance of the powers of this Act, the company laid down a line of tramway along the *Balham Road*, and erected large blocks of stables near that road capable of containing altogether 440 horses, and in which at the present time they had about 200 horses. The Plaintiff was the owner and occupier of a detached house with garden and pleasure-grounds in the *Tooting Park Road*, opening out of the *Balham Road*, the house being about forty-two yards distant from one of the blocks of stables. The Plaintiff complained of the noise and smell caused by the horses in the stables, and brought an action claiming an injunction to restrain the company from using the stables so as to be a nuisance to him or his family. He then served notice of motion for an interim injunction in the same terms. By consent the motion was ordered by Mr. Justice *Kekewich* to be treated as the trial of the action, each party being directed to furnish the other with the points relied upon.

C. A.
1893
RAPIER
v.
LONDON
TRAMWAYS
COMPANY.

The noise complained of was said to arise, particularly at night, from the stamping of the horses, and from the clanking of the patent automatic moveable iron mangers in use in the stables and of the iron chains used for fastening up the horses in the stalls; also from the iron wheelbarrows and buckets, and the shouting of the stablemen.

Before the motion came on for hearing the Defendants endeavoured, and it appeared successfully, to remedy the greater part of the noise complained of, by fixing the moveable mangers, substituting leather straps for the stall chains, and using comparatively noiseless barrows and buckets. On this point, therefore, Mr. Justice *Kekewich* granted no injunction, but gave the Plaintiff 40*s*. damages. The only material nuisance remaining of which the Plaintiff complained was the stable smell. Upon this question a considerable amount of *vivâ voce* evidence was given on both sides.

The Plaintiff also claimed an injunction for the alleged breach by the Defendants of a restrictive covenant by which their property was said to be affected, but this point was given up at an early stage of the argument.

The action came on for hearing before Mr. Justice *Kekewich* on the 1st of November, 1892.

Finlay, Q.C., *Warmington*, Q.C., and *Stokes*, for the Plaintiff, contended that they were clearly entitled to an injunction as to smell, and that, as the Defendants had no statutory authority to create the nuisance complained of, the case did not fall within *London, Brighton, and South Coast Railway Company* v. *Truman* (1) or *Allison* v. *City and South London Railway Company* (2), but rather within *Metropolitan Asylum District* v. *Hill* (3), and *Rylands* v. *Fletcher* (4).

Sir *J. Rigby*, S.G., *Renshaw*, Q.C., and *Gregson*, for the Defendants, relied on their statutory powers as bringing the case within *London, Brighton, and South Coast Railway Company* v. *Truman*.

Finlay, in reply.

(1) 11 App. Cas. 45.
(2) *Times*, February 24th, 1892.
(3) 6 App. Cas. 193.
(4) Law Rep. 3 H. L. 330.

KEKEWICH, J.:—

The first question I have to deal with is that of noise. The Plaintiff says that he has suffered from the noise arising from the Defendants' stables in the vicinity of his house. To my mind that case is fully established; and, more than that, I take it to have been frankly admitted on the part of the Defendants that up to a certain date there was sufficient noise to be disagreeable to the Plaintiff and his family, and disagreeable in the sense of being a nuisance according to the law. It was an intermittent noise; but, as regards noise (I am not now speaking of smell at all), my own opinion is, that its being intermittent is part of the nuisance. One may get accustomed, and people do get accustomed, to a constant noise, loud as it may be, disagreeable as it may be; but an intermittent noise, particularly when it does not come at stated intervals, is likely to be more disagreeable than if it were constant. There was very little doubt about the sources of the noises complained of. I am not now alluding to the evidence about the shouting of the men, either at their horses or at each other; I should not be disposed to attribute much weight to the evidence on that part of the case, or to think that what has occurred up to this time, or up to a few weeks ago, would have been sufficient to justify the interference of the Court. The noise which, I think, does justify interference, or would have done so if it had continued, is that of the metal pails being dropped on the pavement, and the barrows, which were also of metal, being wheeled up and down. And then the ordinary work of the day, the loose mangers and the chains by which the horses were attached to their stalls, were a frequent source of complaint. The Defendants seem to me to have done their very best to remedy what was complained of. They have provided other pails and other barrows, and they have fixed the moveable mangers and substituted leather straps for the metal chains. It has been conceded on the part of the Plaintiff that there is no longer any noise to complain of.

What, then, is the duty of the Court under such circumstances? Is it to grant an injunction, with or without nominal damages, merely to give the Plaintiff the costs of the action, and so, while admitting their right to relief in the first instance, to

C. A.
1893
RAPIER
v.
LONDON
TRAMWAYS
COMPANY.
Kekewich, J.

give them none of a substantial character? I do not think it is possible to lay down any rule on the point, and I could with very little difficulty state many cases in which it would be right, and the imperative duty of the Court, to grant an injunction to restrain the repetition of wrongful acts, even though those wrongful acts had already ceased. On the other hand, there is manifest inconvenience in granting an injunction, because the remedial process following upon that is a motion to commit, or, as against a corporation, for sequestration, and that is an inconvenient mode of raising the question; it is also somewhat severe against the Defendants where they have shewn a desire to cope with an evil and remedy it as far as possible. Without attempting to lay down a rule, I think this case falls within the class in which it is better not to grant an injunction. Whether I could properly on this head, according to the practice of the Court, make the Defendants pay the costs, without giving any relief at all, I am by no means sure; but my own notion is that it is not logically right to make Defendants pay costs except as a consequence of some relief. I think it the safest and best thing to grant some relief. I therefore propose on this branch of the case to order the Defendants to pay 40*s*. damages; and those damages will carry the costs of the action on this part of the case. So much for the noise.

Now I approach the more difficult and important question. Here, unfortunately, there is a remarkable conflict of evidence. In the first place, I have a body of evidence on the part of the Plaintiff of the existence of this smell which is complained of. On the other hand, I have a body of evidence that there is not, on the Defendants' premises, any source from which this smell can possibly emanate. Then I have this—that the different witnesses who define the smell define it in many different ways, some of them wholly inconsistent with each other. [His Lordship then reviewed the evidence on this point, arriving at the conclusion that the smell from the Defendants' stables, and described by several witnesses as a "stink," existed on the Plaintiff's premises sufficiently often and in sufficient force to constitute a nuisance at common law. His Lordship then proceeded:—]

Are the Defendants responsible for that in this Court? Responsible in fact I have already held them to be. Are they responsible so as to be liable to injunction—so as to be liable to be told that they must either give up the stink or give up the stables? It is, of course, a matter of the very greatest importance to them, and it is a question of some difficulty.

Let me, before going further, say what there is to be said, in as few words as possible, about a case before myself which has necessarily been quoted, and which, therefore, I cannot avoid mentioning, *Allison* v. *City and South London Railway Company* (1). In that case, though I expressed my view of the law, I really only said over again in my own language that which had been said by several of the learned Lords in *London, Brighton, and South Coast Railway Company* v. *Truman* (2) and *Metropolitan Asylum District* v. *Hill* (3); and, so far as *Allison's Case* is applicable to the present, I have nothing to add to or detract from what I said on that occasion. The question is, Has the Legislature authorized the construction of these stables—that is to say, authorized in the sense in which the Legislature authorized the construction of the engines which were the source of nuisance in *Allison's Case*? There I was of opinion that such authority had been given; that (whether wisely or unwisely it was not for me to say) the Legislature had come to the conclusion, either that the works of the company could be carried on without creating a nuisance, in the way which was indicated by the Act of Parliament, or that, if unfortunately a nuisance was inevitable, it must be borne by the neighbours, however injurious to them and their property, for the benefit of the general public. Is that the conclusion at which I ought to arrive here? If it is, the grounds of it must be found in the Act of Parliament.

Mr. *Gregson* has referred to the earlier Acts, not of this company, but of the companies which have been absorbed by the *London Tramways Company* with which we are now concerned: he has pointed out that those earlier Acts, or some of them, do contain power to purchase and acquire land, and his

(1) *Times*, February 24th, 1892. (2) 11 App. Cas. 45.
(3) 6 App. Cas. 193.

C. A.
1893
RAPIER
v.
LONDON
TRAMWAYS
COMPANY.
Kekewich, J.

suggestion in argument is that the company must be taken to have acquired this particular land under those powers. I do not follow that. The company have other powers, because they are incorporated under the *Companies Acts*, 1862, and following years, and they have powers entirely independent of the Acts of the companies which they absorb. Having two sets of powers, it does not seem to me to follow that they must have acquired this land under one Act when the other would have been equally useful. But, supposing for the moment that they have done so, all that these earlier Acts provide is a power to purchase land for the tramways there authorized, not to acquire land convenient for the use of the tramways authorized by the later Act of 1888; so that it seems to me that those earlier Acts do not assist the Defendants.

But the Solicitor-General went further, and said that he found a distinct authority in the Defendant company's own Act to erect these stables. The 4th section of the Act of 1888 enables the company "to make, form, lay down, work, use, and maintain" the several lines of tramway thereinafter described (which, be it observed, are three small lines of six, five, and four furlongs each, that is to say, fifteen furlongs altogether—not quite two miles), and according to the deposited plans and sections, "with all proper rails, plates, works, and conveniences connected therewith"; and the Solicitor-General says the expression "and conveniences" includes stabling for 400 or even 800 horses. He says that "conveniences" must have this wide construction because the 24th section gives the company power to make such crossings, passing-places, and so forth, "and other works in addition to those particularly specified in and authorized by this Act as they find necessary or convenient for the efficient working of the tramways, or for providing access to any warehouses, stables, or carriage-houses or works of the company."

I follow the argument entirely to this extent, that the Legislature has authorized this company to work certain tramways. It has provided that, subject to those powers which I do not think I need deal with, they must work them by animal power, and, as the Solicitor-General put it, animal power means horses

or mules. Let it be said that it means horses. Well, horses must have stables, and those stables must be in a convenient place for access to the tramways. But where is the power in this Act of Parliament to get those stables? It is nowhere unless it is in the word "conveniences." Apply to the 4th section the ordinary rules of construction—"with all proper rails, plates, works and conveniences"—surely those conveniences, as well as the rails, plates, and works, must have some physical connection with the tramways which are to be in certain lines according to the deposited plans and sections. But even if you ought not to limit the word "conveniences" in that way, you must limit it to something *ejusdem generis*. To say that under the head of "works and conveniences" are to be thrown in, in addition to "proper rails and plates," such stables as this company have erected in this particular place, and may erect for the whole of their lines at many other places, seems to me to be something very little short of absurd, and I cannot myself think that the language of the 24th section really assists me to construe the 4th in that way.

But, again, the company must have stables. How are they to get them? They have some power under the earlier Acts, but they have also the ordinary power which any person, or any corporation incorporated under the Acts of 1862 and 1867, and empowered by their constitution, may have. To my mind the conclusion is inevitable, that the Legislature was only giving the company such power as it required. That is, I think, the proper way of construing an Act of Parliament. I do not think now that it is customary to insert in these Tramway Acts, or in the Provisional Orders, the recital that what is proposed to be done cannot be done without the authority of Parliament; but it is the governing idea of legislation of this class, and it is common knowledge, that Parliament declines to enact privileges, powers or authorities which do not require parliamentary sanction.

I therefore conclude that, parliamentary power not being required to enable this company to purchase land or to build stables, the Legislature must have intended that they should use the ordinary authority which they possessed through their

C. A.
1893
RAPIER
v.
LONDON
TRAMWAYS
COMPANY.
Kekewich, J.

constitution, and that their authority is confined to that. If it is confined to that, they are subject to all the rules which affect all Her Majesty's subjects generally. They may acquire land, they may erect stables, they may keep any number of horses, they must do what is necessary; but they must do it subject to this, that they must not incommode their neighbours. Suppose the company found it necessary to erect a steam-engine, not for working their line, but for working their stables. It is possible that, if they collect such an enormous number of horses, steam-power may, at the close of the 19th century, be most important, almost essential for many purposes: it does not seem beyond the power of imagination that forage for all these horses could not be conveniently supplied without a steam-engine. Could it be contended that this company would be allowed to erect a steam-engine in close proximity to a dwelling-house, so as to be a nuisance in this ordinary sense of the word to that dwelling-house, because they are allowed to have stables and acquire land for that purpose? I cannot myself see that there are any words which imply that sanction. The case has been rested, on one side, on *Metropolitan Asylum District* v. *Hill* (1), and on the other on *London, Brighton, and South Coast Railway Company* v. *Truman* (2). The distinction between the two cases, which I do not intend to examine at length, is summed up in a few words in the speech of Lord *Halsbury* in the latter case (3). He draws attention to the enactment in the *Brighton Act*, that "in addition to the lands authorized to be taken expressly, the company for such purposes might acquire other land, but restricted this power of purchase in several important particulars." And then a few lines lower down he says: "I believe the whole question must turn on the effect to be given to the section (82) which creates this flexible machinery for providing additional accommodation." Applying that, which seems to me to be the key to what was said, not only by Lord *Halsbury*, then Lord Chancellor, but by the other noble and learned Lords, to this case, I do not find that "flexible machinery" here. That must be understood to be the key to much that I have said on

(1) 6 App. Cas. 193. (2) 11 App. Cas. 45.
(3) 11 App. Cas. 51.

this point and to my conclusions. I find no machinery at all for providing this accommodation or for the erection of stables. This, in my opinion, is left to the ordinary powers of the tramway company. Far be it from me to say, with those cases before me, that other principles could not be discussed; but the matter is perfectly clear, and I have satisfied my mind that there is no such power here, and that, therefore, the company are not justified in creating a nuisance which the Legislature has not authorized, and thereby incommoding their neighbours, and that, consequently, they are amenable to the jurisdiction of the Court in a matter of this kind.

I have already said, on the question of fact, that what the Defendants have done and are doing has created, does create, and, I am satisfied, will create and continue to create, a nuisance; and therefore I think I must grant the injunction asked as regards smell, omitting the words "noise or otherwise." Accordingly, the form which the judgment will take will be this: There will be an injunction as regards smell, and there will be an order for 40*s*. damages in respect of the noise, the Court not thinking fit to grant an injunction as to noise, it having ceased. Then the order for costs will take this form: The Defendants will pay all the costs of the action except so far as they have been increased by the Plaintiff seeking an injunction under the covenant, and those costs will be paid by the Plaintiff; that is to say, they will be set off against the general costs of the action, which they will get from the Defendants.

G. I. F. C.

C. A.

From this judgment the Defendants appealed. The appeal came on to be heard on the 12th of May, 1893.

Willis, Q.C., and *Gregson* (*Renshaw*, Q.C., with them), for the Appellants:—

The judgment of the Court below was against the weight of evidence. The *onus* on the Plaintiff is not only to prove that there was a serious nuisance from the smell, but to prove that the smell proceeded from the stables. He has failed in both of those points. The evidence which he has produced was on the face of it grossly exaggerated and is directly contradicted by

C. A.
1893
RAPIER
v.
LONDON
TRAMWAYS
COMPANY.

the Defendants' evidence; and, further, it entirely fails to trace the smell to the stables. On the other hand, there is evidence that a very bad smell was caused by the passage of carts along the road in the morning and evening carrying offal of all kinds to and from the piggeries at *Mitcham*, from which the smell may well have proceeded. But if the evidence should be held sufficient, we deny that the Plaintiff is entitled to an injunction, because the stables were built under statutory powers. The Defendants were empowered by their private Act of 1888 (51 & 52 Vict. c. cxliv.), s. 4, to make and use the tramways and all proper "works and conveniences connected therewith," and they were bound to complete the tramways within two years and to use horses for drawing the cars as prescribed by the *Tramways Act*, 1870 (33 & 34 Vict. c. 78), s. 34. Therefore there is an implied power to maintain stables, which must be in close proximity to the line of tramway. The work of the company could not be carried on without such stables. Moreover, by the Act of 1888, s. 24, the Defendants may make and maintain such crossings, sidings, and other works, in addition to those specified in and authorized by the Act, as they may find necessary or convenient for the efficient working of the tramways and for providing access to "the warehouses, stables or carriage-houses" of the company. Therefore the case comes within the principle of *London, Brighton, and South Coast Railway Company* v. *Truman* (1), and is distinguishable from *Metropolitan Asylum District* v. *Hill* (2). The only limit to their power is that they must use reasonable care to avoid a nuisance.

Finlay, Q.C., *Warmington*, Q.C., and *Stokes*, for the Plaintiff, were only called on to argue on the question of the source of the smell complained of, but were stopped by the Court.

LINDLEY, L.J.:—

I think it is impossible to disturb the judgment or order which is appealed from. The case is one of very considerable importance both to the Plaintiff and to the Defendants, and it is also of importance from a public point of view.

(1) 29 Ch. D. 89; 11 App. Cas. 45. (2) 6 App. Cas. 193.

The first point which we have to consider is the Act of Parliament under which, if at all, the Defendants can justify what they have done. Now, what they have done is this. Being a company formed for making tramways, they have bought a piece of land near the Plaintiff's house, about five acres in extent. They have erected, at very considerable expense, very excellent stables upon this land, capable of holding more than 400 horses, but used apparently up to the present time for 200, more or less. All that is perfectly lawful. There is no reason why people should not have stables, and large stables too, provided only they carry on their stable business in such a way as not to occasion a nuisance to their neighbours. The Act of Parliament to which Mr. *Willis* has referred does not appear to me to do more than authorize them to create and make a certain tramway; it proceeds on the assumption that they may use animal power; I do not think it otherwise authorizes such use. Animal power for such a purpose in this country means horse-power, and as a matter of course the Defendants must have horses. That involves, as a natural consequence, stables to put them in. To that extent the Act of Parliament authorizes the Defendants to have stables and horses. I agree with Mr. *Willis* that it is for the directors to say, within limits which I will discuss presently, where they shall have stables, how many horses they will have, and where they will locate them. What are the limits of that discretion? Mr. *Willis* says this Act of Parliament, which does not say anything expressly about stables or horses, gives the directors power to do whatever in the exercise of their discretion they may think reasonable and proper in their own interests, provided they take all reasonable care not to commit a nuisance. Is that the true construction of the Act of Parliament? or is it that they may do what they may think right in the exercise of their own discretion provided they do not commit a nuisance? Which is it? The whole case up to a certain point turns on that. An Act of Parliament might be so worded as to cast upon them no greater duty than the duty to take reasonable care. Unless the Act of Parliament is so worded as to limit their duty to that extent, I think the common law must prevail, that they must exercise their power so as not to commit a nuisance. At common

C. A.
1893
RAPIER
v.
LONDON
TRAMWAYS
COMPANY.
Lindley, L.J.

law, if I am sued for a nuisance, and the nuisance is proved, it is no defence on my part to say, and to prove, that I have taken all reasonable care to prevent it. The Act of Parliament may be an answer. It was an answer in the case of *London, Brighton, and South Coast Railway Company* v. *Truman* (1), and it might be an answer here if the Act of Parliament went further than it did. I cannot find that the Act of Parliament contains any clause which warrants us in saying that no limit is set to the exercise of the discretion of the directors except the duty to take reasonable care not to create a nuisance. The only limit I can find is the limit which is set by the general law of the country that they do not commit a nuisance. Within that limit they may have what stables they like, they may have what number of horses they like, and they may conduct them how they like.

That being the law applicable to the case, I now pass on to consider the facts. Do the Defendants so carry on their business as to commit a nuisance? What is meant by the word "nuisance" in this particular case? The alleged nuisances were two—noise and smell. The noise is not now in question, so I will say nothing more about that. It is alleged that the Defendants carry on their business in the stable in such a way as to create smell to such an extent as seriously to diminish the comfort of the neighbours who live near, and in particular seriously to interfere with the comfortable enjoyment of the house and land of the Plaintiff. That is the alleged nuisance. The question is whether the Defendants do or do not create in the conduct of their business such a smell as diminishes the reasonable enjoyment and comfort of the Plaintiff's house. The fact that somebody with a sensitive nose smells some ammonia and does not like it will not prove a nuisance; it is a question of degree. You can only appeal to the common sense of ordinary people. The test is whether the smell is so bad and continuous as to seriously interfere with comfort and enjoyment. No one says it is so bad as to interfere with health. Looking at it from that point of view, it is obvious we cannot go the length of saying that there is no evidence of the nuisance. The learned Judge, having seen all the witnesses, has come

(1) 29 Ch. D. 89; 11 App. Cas. 45.

BENGAL SECRETARIAT LIBRARY

to the conclusion that a nuisance is made out. I cannot agree with the observation that this conclusion is entirely unfounded; the utmost that I can say is that there might be ground for a new trial. Would it then be right to put the parties to the expense of a new trial? Can I say there is so much unsatisfactory evidence that the Court ought not to act upon the judgment to which the learned Judge in the Court below has come? I do not think we ought to say that. There has been much exaggeration on the part of the Plaintiff's witnesses. The erection of the stables is no doubt an annoyance to the Plaintiff, and one must make a certain amount of allowance for his anxiety to get rid of them if he can. It is quite right to ask us to look at the Plaintiff's evidence as interested testimony and to discount it; but, making all the allowance which can reasonably, fairly, and properly be made on both sides—not to the Plaintiff more than the Defendants—there is a body of evidence which I think it is impossible to get over. I am struck with the diversity of the smells which have been deposed to by the Plaintiff and his witnesses. But, making allowance for that, and bearing in mind that some have spoken of foul stinks and stenches, which can hardly come from the stable, there is still a great body of evidence of nuisance. That body of evidence does not depend on the interest which the witnesses have, but on other people who are more or less disinterested; they may be neighbours or friends, but they are not so much interested as the Plaintiff, his wife, and his servants. It is proved that, before the stables made their appearance, the smell did not exist. There is a body of evidence which shews that, before the stables came, there was no smell to complain of, and that after they came there was a smell. That is very important evidence with reference to the cart theory. I gather from the evidence that there do pass along this high-road near the Plaintiff's house and garden a quantity of carts with offensive filth in them—rotting manure, highly fermented, with very likely a great deal of refuse from eating-houses, hotels, and taverns, which is being carried down to the piggeries at *Mitcham*. These carts are, probably, very offensive; but that has been going on for the last twenty years—not to so great an extent as now, perhaps, but long before the stables

C. A.
1893
RAPIER
v.
LONDON
TRAMWAYS
COMPANY.
Lindley, L.J.

came to the neighbourhood, and it has been going on since. I regard the cart theory when it is sifted out as a plausible theory, but rather as a red herring dragged across the path. No doubt the carts produce a stench as they go along; but I do not think that is the cause of the mischief which is complained of by the Plaintiff. Then there is very considerable evidence to shew that the smells which are deposed to by the Plaintiff's witnesses, and by persons who are not members of his family, are to be traced to the stables. There is not only the evidence of the odour and so on; but it is proved that there is no other place in this neighbourhood from which the smells can come.

The result is that we cannot disturb the order which has been made. That order is in the common form, namely, to restrain the Defendants from carrying on the business of their stables so as to create a nuisance to the Plaintiff. What that may involve I cannot possibly say. If the Defendants are right in saying that they cannot concentrate their stables to such an extent as is desirable without committing a nuisance to the neighbourhood, then they must not concentrate their horses to such an extent. It is a mere question of money; it is nothing but economy which requires them to crowd their horses together. In their attempt to economize, I think they have gone too far. If they cannot have 200 horses together, even when they take proper precautions, without committing a nuisance, all I can say is, they cannot have so many horses together. No doubt it is a serious matter to them; but I cannot bring my mind to say that I disagree with the learned Judge who tried the case in the Court below.

BOWEN and KAY, L.JJ., concurred.

Solicitors: *Woodard & Hood; J. O. Jacobs.*

M. W.

JONES *v.* CONWAY AND COLWYN BAY JOINT WATER SUPPLY BOARD.

C. A.
1893
NORTH, J.
April, 14, 20.
C. A.
1893
May 16.

[1893 J. 525.]

Local Government—Water Supply—Works outside District—Joint District Board—Consent of Authority of adjoining District—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), ss. 16, 32, 33, 34, 54, 285—"*Supply Water.*"

A local authority that has power, and is taking steps, to supply water, does "supply water" within the meaning of sect. 54 of the *Public Health Act*, 1875.

Where a local authority has the consent of the local authority of an adjoining district to make sewers, or lay down water-mains on land in such adjoining district, they can only do so subject to the provisions of sects. 32, 33, and 34 of the *Public Health Act*, 1875, applicable to such work.

The decision of *North*, J., affirmed.

THIS was an action by the tenant for life of certain grazing land to restrain a joint water board from entering on his land and carrying water-mains into, through, or under his land. The action was brought on on motion for an interlocutory injunction treated as the trial, before Mr. Justice *North* on the 14th of April, 1893.

The Defendants were a joint water board, constituted by a Provisional Order duly confirmed by an Act of Parliament, which received the Royal Assent on the 5th of August, 1891, for the purpose of obtaining a joint water supply for a district which comprised the borough of *Conway*, the *Colwyn Bay*, and *Colwyn* Local Government District, and certain contributory places situated in the rural sanitary district of the *Conway* Union. Article XIII. of the Provisional Order provided as follows:—

"The purposes for which the united district is formed are as follows: (*a*) For procuring a common supply of water for the constituent districts; (*b*) For the acquisition of such lands, waterworks, rights, powers, easements, or privileges, and the execution, maintenance, improvement, enlargement, and extension of such works, and the doing of any such acts, as may be necessary and proper for collecting, impounding, storing, and conveying water for distribution by the several constituent

C. A.
1893
JONES
v.
CONWAY AND COLWYN BAY JOINT WATER SUPPLY BOARD.

authorities for public and private purposes, and generally to carry into effect the purpose firstly hereinbefore mentioned, and any other purpose connected therewith or incidental thereto."

Article XV. provided: "(1.) The joint board shall have, exercise, perform, and be subject to all the powers, rights, duties, capacities, liabilities, and obligations of a local or urban sanitary authority in relation to water supply, under the *Public Health Act*, 1875, or any Act amending that Act, so far as the same are applicable to the purposes of this Order, and the provisions of the *Public Health Act*, 1875, and of any Act amending that Act, in relation to water or works belonging to a local or urban sanitary authority, shall, so far as the same are applicable, extend and apply to any water or works belonging to the joint board;" and (2.) incorporated in the Provisional Order, among other sections of Acts relating to public health, the sections of the *Public Health* (1875) *Act* relating to purchase of lands and arbitration, and "sect. 285, relating to the execution of works in adjoining districts, and combination for execution of works."

Article XX. provided: "All works made by the joint board shall vest in and be under the control of the joint board; but each constituent authority shall be entitled as of right to receive a supply of water from the joint board sufficient for use in their district for public and private purposes, and for this purpose to connect their distributing basins or other works with the works of the joint board," subject to certain provisions.

The Plaintiff's land was situated in a district of the *Conway* Rural Sanitary Authority, outside the Defendants' district. The *Conway* Rural Sanitary Authority had consented to the Defendants doing the work in question in this action. On the 13th of February, 1893, formal notice was given by the clerk of the Defendant board to the Plaintiff, under sect. 16 of the *Public Health Act*, 1875, that on or after the 15th of March, 1893, the Board would carry water-mains into, through, or under a part of the Plaintiff's land. The Defendants' engineer had duly certified that the work was necessary.

Farwell, Q.C., and *Pattullo*, for the Plaintiff:—

The questions in the action mainly depend upon the construc-

tion of the provisions of the *Public Health Act*, 1875 (1). The Defendant board have no power to enter on the Plaintiff's land

(1) 38 & 39 Vict. c. 55. The principal sections referred to were the following:—

Sect. 16. "Any local authority may carry any sewer through across or under any turnpike road, or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriageway of any street, and, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary), into through or under any lands whatsoever within their district.

"They may also (subject to the provisions of this Act relating to sewage works without the district of the local authority) exercise all or any of the powers given by this section without their district for the purpose of outfall or distribution of sewage."

Sect. 32: "A local authority shall, three months at least before commencing the construction or extension of any sewer or other work for sewage purposes without their district, give notice of the intended work by advertisement in one or more of the local newspapers circulated within the district where the work is to be made.

"Such notice shall describe the nature of the intended work, and shall state the intended termini thereof, and the names of the parishes, and the turnpike roads and streets, and other lands (if any) through across under or on which the work is to be made, and shall name a place where a plan of the intended work is open for inspection at all reasonable hours; and a copy of such notice shall be served on the owners or reputed owners, lessees or reputed lessees, and occupiers of the said lands, and on the overseers of such parishes, and on the trustees, surveyors of highways, or other persons having the care of such roads or streets."

Sect. 33 provides that if any such owner or other person gives notice of objection to such work within three months the work shall not be commenced without the sanction of the Local Government Board.

Sect. 34 provides for the holding of an inquiry by the Local Government Board.

Sect. 54: "Where a local authority supply water within their district, they shall have the same powers and be subject to the same restrictions for carrying water mains within or without their district as they have and are subject to for carrying sewers within or without their district respectively by the law for the time being in force."

Sect. 285: "Any local authority may, with the consent of the local authority of any adjoining district, execute and do in such adjoining district all or any of such works and things as they may execute and do within their own district, and on such terms as to payment or otherwise as may be agreed on between them and the local authority of the adjoining district; moreover two or more local authorities may combine together for the purpose of executing and maintaining any works that may be for the benefit of their respective districts or any part thereof. All moneys which any local authority may agree to contribute for defraying expenses incurred under this section shall be deemed to be expenses incurred by them in the execution of works within their district."

C. A.
1893
JONES
v.
CONWAY AND COLWYN BAY JOINT WATER SUPPLY BOARD.

except under the provisions of the *Lands Clauses Act.* They are not a local authority who "supply water within their district" within the meaning of sect. 54 of the *Public Health Act*, 1875, inasmuch as they do not supply any water yet. Therefore they have not powers analogous to the powers of a local authority with respect to the construction of sewers within their district given by sect. 16 of the *Public Health Act*, or without their district, given by that section and modified by reference to sect. 32 of the Act.

If sect. 54 could be read so as to apply to the Defendant board, inasmuch as sect. 29 among other sections of the *Waterworks Clauses Act*, 1847, is incorporated, the Defendant board are prohibited from entering the Plaintiff's land, except under the *Lands Clauses Act*, without the previous consent of the Plaintiff: *Hill* v. *Wallasey Local Board* (1).

Supposing both these contentions fail, the Defendants can only enter on the Plaintiff's land, which is outside their district, after having given three months' notice required by sect. 32, giving persons affected the opportunity of objecting. For this reason the Plaintiff is entitled to an injunction.

Byrne, Q.C., and *Ashton Cross*, for the Defendants:—

The Defendant board have power to supply water, and are constituted for no other purpose than to supply water, they are taking active steps to put themselves in a position to deliver water; they are plainly within the scope of sect. 54 of the *Public Health Act*, both on the natural meaning of the section, and looking at the plain object of the section. They therefore have similar powers with respect to putting down water-mains that a sanitary authority has with respect to making sewers.

The Defendants have the consent of the local authority of the adjoining district to lay the mains in question; they therefore are in the same position with respect to putting down this main as if the land through which it is to pass were within their district.

They have given reasonable notice required by sect. 16. The work has been duly certified to be necessary. They are entitled,

(1) [1892] 3 Ch. 117.

therefore, under sect. 16, to enter at once, subject to paying compensation to be afterwards assessed: *Roderick* v. *Aston Local Board* (1); *Lewis* v. *Weston-super-Mare Local Board* (2).

The case is not one for granting an injunction, even if the Defendants are exceeding their legal rights: *Goodson* v. *Richardson* (3).

Farwell, in reply:—

The consent of the local authority of the adjoining district (under sect. 285 of the Act) to the Defendants laying the water-mains in such adjoining district does not make a part of the adjoining district actually in the district of the Defendants. It cannot override the express enactments as to the formalities to be observed under sect. 32 previously to doing work out of the district.

NORTH, J. (After referring to the general scope of the *Public Health Act* and the Provisional Order constituting the Defendant board, and the facts leading up to this action, continued):—

It is said by the Plaintiff that the 54th section of the *Public Health Act* does not apply, inasmuch as the joint board are not a local authority supplying water within their district, the only supply in what may be called the joint district being the separate supplies of the separate constituent bodies in their separate districts. I do not agree with that argument. I think that the 54th section does apply here. I think the phrase, "where a local authority supply water within their district" is intended to apply to cases where a local authority has taken on itself the burden of carrying out the sections of the Act relating to water supply, which are not compulsory but optional. In one sense it would be the duty of a local authority to undertake the supply, if the circumstances of the case required it to be done: and I read the words, "where a local authority supply water within their district," as meaning where a local authority is not merely an authority which is already a water-supplying

(1) 5 Ch. D. 328. (2) 40 Ch. D. 55.
(3) Law Rep. 9 Ch. 221.

C. A.
1893
JONES
v.
CONWAY AND COLWYN BAY JOINT WATER SUPPLY BOARD.
North, J.

body, but where it is a local authority providing a supply of water within the district: that is exercising the powers of water supply within the district. To put a different construction upon it would seem to me to lead to an absurdity. Mr. *Farwell's* argument was this: that whenever a local authority proceeded to supply water their first step, at any rate, must be taken under sect. 51, and they must adopt the course of either constructing works of their own, or leasing or buying waterworks, or contracting with some person for a supply of water: and that it is only after they have come into existence for that purpose, and are acting under that provision, that they can invoke the assistance of the 54th section. That, in my opinion, is not the meaning of the Act. It seems to me it would be very absurd to say that they must in the first place, to some possibly very limited extent, actually supply water, but that as soon as they have turned on water to a single house within the district they come within the words, "a local authority supplying water within their district," and then only sect. 54 applies. Take the case of sewers. Suppose a body is sewering a district, I see nothing in sect. 16 to say that they may not enter upon lands within their district before they have drained a single house, and that they cannot do so while they are making the sewers, which, when completed, will effect the draining of the district. So here, it seems to me to be absurd to require them in the first instance to do something, however small, to supply water before they are in a position to have recourse to sect. 54.

In my opinion, therefore, a local authority supplying water within their district means a local authority taking the steps contemplated by this Act for supplying water within the district; *i.e.*, exercising the powers given them by the Act in relation to a supply of water. In my opinion, therefore, the Defendants are within sect. 54.

[His Lordship referred to sects. 16, 32, 33, and 34 of the *Public Health Act*, 1875, and continued:—]

Now, it is conceded that no notice has been given under sect. 32, and nobody has had an opportunity of making any objections thereunder to the works now proposed. That seems to me to be a very formidable difficulty in the way of the Defendants.

The only question is whether they can get out of it by reason of sect. 285. That provides in effect that the Defendant authority may—having procured the consent of the local authority of the district in which the Plaintiff's land is situated—"execute and do in such adjoining district all or any of such works and things as they may execute and do within their own district, and on such terms as to payment or otherwise as may be agreed on between them and the local authority of the adjoining district."

The argument is that, as they have got the leave of the authority of the adjoining district, they may do in that adjoining district everything that they might do within their own district; therefore, by virtue of the 285th section, the adjoining district where the Plaintiff's land is is for this purpose made part of their own district; and therefore they may make a water-main through it, as a sewer might have been made through it under the first part of sect. 16, without the second part of sect. 16 having any application. In my opinion, that is not the true meaning of sect. 285. I think the object of sect. 285 is to enable the local authority acting under it to do certain things as within their powers which but for the section would have been outside their powers. They can do certain things in an adjoining district without the imputation of acting *ultrà vires*, if they have got the consent of the local authority. But in my opinion that has not the effect of making the adjoining district or that portion of it their own district for all the purposes of sect. 16; or, in other words, it does not dispense with the necessity, as between themselves and owners of land or other persons, of observing the requirements that have to be observed with respect to sewers where sewers are made outside the district of the board that is making them. To read that section as I am asked to read it would amount to this, that I should have to read the earlier portions of the Act as though it said that a local authority may enter any land within their district for the purpose of a sewer; and may also go outside their own district for the purpose of a sewer if they either observe the provisions of the Act relating to sewerage works without the district, or can obtain the leave of the local authority for the adjoining district.

C. A.
1893
JONES
v.
CONWAY AND COLWYN BAY JOINT WATER SUPPLY BOARD.
North, J.

Now, sects. 32 and 34 are a special set of sections, and are grouped under the heading "As to Sewage Works Without District," and, in my opinion, those three sections are what are referred to in the latter part of sect. 16, where it says: "They may also, subject to the provisions of this Act relating to sewage works without the district of the local authority." The board cannot, therefore, enter upon lands outside their district without complying with the provisions of sects. 32 to 34 of the Act. I was not referred to any authority, and I have not been able to find any authority, throwing any light upon the construction of this 285th section; but the view I take is that, whatever its effect may be in conferring powers as to what otherwise is not within their powers, it does not enable them to deal with owners of land without their district, unless they comply with the provisions of sects. 32 to 34.

Another point was raised on behalf of the Plaintiff which it is not necessary to consider; but I have formed my opinion upon it. I think the law is clear, and I do not hesitate to express it, that, assuming that in other respects the Defendants had been right, it would have been quite sufficient for them to do what they have done without proceeding to take the land under sect. 176. They would have a right to enter upon the land and do their works without taking the land, though of course they would have to make compensation to the persons whose lands were entered upon for any injury done under the Act. But there is nothing in the Act requiring that such compensation shall precede the entry upon the land. The cases of *North London Railway Company* v. *Metropolitan Board of Works* (1), and *Lewis* v. *Weston-super-Mare Local Board* (2), as well as *Roderick* v. *Aston Local Board* (3), are authorities to that effect.

The result is, the Plaintiff is right in complaining that the Defendants have entered on his lands without having taken the steps necessary under sects. 32 to 34. I will grant an injunction restraining the Defendants from entering on the lands without complying with the provisions of the *Public Health Act*, 1875.

D. P.

(1) Joh. 405. (2) 40 Ch. D. 55.
(3) 5 Ch. D. 328.

From this decision the Defendants appealed. The appeal was heard on the 16th of May, 1893.

Byrne, Q.C., and *Ashton Cross*, for the Appellants, referred to the *Public Health Act*, 1875, ss. 16, 32, 54, 285.

Farwell, Q.C., and *Pattullo*, for the Plaintiff, were not called on.

LINDLEY, L.J.:—

The more the sections which have been referred to are examined the more plain the case becomes; and I propose to say little beyond expressing my concurrence in the judgment of Mr. Justice *North*, who has exhaustively considered the various provisions of the Act. Sect. 54, which relates to a local authority supplying water, deals with the matter by reference to sect 16, which relates to the making of sewers. That section consists of two parts, one of which relates to what may be done by a local authority within their own district, and the other part refers to the provisions of the same Act relating to sewage works outside their district. That must mean sects. 32, 33, and 34 of the Act. The present case is one where there is a united board; and we find that the united district which has been formed does not include the whole of the separate districts mentioned in the Provisional Order, but leaves some parts outside; so that the jurisdiction of the joint board is not coterminous with the districts of the several boards which were united. The Plaintiff's land is outside the joint district. But sect. 285 gives power to any local authority with the consent of the local authority of an adjoining district to execute works in such district. Substituting "joint board" for "local authority" in that section it provides that any joint board may "with the consent of the local authority of an adjoining district execute and do in such adjoining district such works and things as they may execute and do in their own district on such terms as to payment or otherwise as may be agreed on between them and the authority of such adjoining district." Those words make it clear that the section is dealing with what may be done as between the two boards, and has nothing to do with the rights of individuals. Therefore sects. 32,

C. A.
1893
JONES
v.
CONWAY AND COLWYN BAY JOINT WATER SUPPLY BOARD.

33, and 34 apply to this case, and in my opinion the learned Judge was right, and the appeal must be dismissed.

BOWEN and KAY, L.JJ., concurred.

Solicitors: *Bell, Brodrick, & Gray*, agents for *Glynne Jones, & Jones, Bangor; Cunliffes & Davenport*, agents for *Jones & Porter, Conway.*

M. W.

C. A.
1893
May 17.

In re WESTMORELAND GREEN AND BLUE SLATE COMPANY.

BLAND'S CASE.

Company—Directors—Present from Promoter to Director—Nominal Vendor with no Interest.

P. and *Q.* were working a quarry in partnership. *P.* also owned an adjoining quarry, and had the option of taking a lease of *S. Quarry.* Wishing to form a company for working the quarries they called in *A.* and *B.* to assist them. A lease of the *S. Quarry* was granted to *P.*, *Q.*, *A.*, and *B.*, and on the same day the four entered into an agreement with a trustee for the intended company to sell to the company the three quarries for a sum to be paid partly in cash and partly in paid-up shares, *A.* and *B.* to receive 120 shares each. The company was formed. *B.* was one of the first directors; the agreement was confirmed, and *A.* and *B.* received their shares. The company was ordered to be wound up, and it turned out that *A.* and *B.* had no interest in the property sold to the company except their interest as lessees of *S. Quarry* under the lease of even date with the agreement, and *B.* admitted that he had no interest in the *S. Quarry* till that day, and had nothing to do with fixing the price. The articles provided that the agreement for sale should not be impeached on the ground of the directors, or any of them, being vendors or being promoters of the company, nor should they be accountable for benefits secured to them. *Kekewich*, J., held that *B.* was liable to contribute to the assets of the company a sum equal to the nominal amount of the shares issued to him and to *A.* on the ground of his misfeasance as director in accepting the shares allotted to himself and in allowing *A.'s* shares to be issued to him:—

Held, affirming this decision, that, although if *A.* and *B.* had been *bonâ fide* owners of shares in the *S. Quarry* and had agreed to sell their interests for shares in the company, the transaction could not have been impeached, the insertion of their names as vendors when they had no real interest in the property sold was a device for enabling them to get fully paid-up shares

for their services in the promotion of the company, and that the issuing them was a misfeasance on the part of the directors, and that as it was not known to the company that *A.* and *B.* were not really vendors, the clause in the articles did not protect *B.*

AT the beginning of 1886 *Poole* and *Binns* were working a leasehold quarry called the *Moss Rigg Quarry*, in partnership. *Poole* was also owner of an adjoining freehold quarry called *Whinney How*, and had obtained the right to have a lease of *Stone Dykes*. *Poole* and *Binns* proposed to get up a company to work all three quarries together, and called in *Ashworth* and the present Appellant *Bland*, who was a contractor, to assist them. Some expenses were incurred by *Bland* in inspecting the property and otherwise.

On the 16th of February, 1886, a lease of *Stone Dykes* was granted to *Poole*, *Ashworth*, *Binns*, and *Bland* for a term of twenty-one years.

On the same day an agreement was entered into between *Poole*, *Ashworth*, *Binns*, and *Bland* of the one part, and *J. S. Sawrey*, as trustee for the intended company, of the other part, which began by reciting, "Whereas the parties of the first part (hereinafter called the vendors) are in divers degrees the owners of the properties hereinafter mentioned and of the business carried on thereat," and reciting that a company was about to be formed to acquire and work these properties, and that its capital was intended to be £30,000 in £5 shares, it was agreed that the vendors should sell and the company should purchase (1.) *Poole's* freehold property the *Whinney How*; (2.) the interest of the vendors in *Stone Dykes* under the lease; and (3.) the interest of *Poole* and *Binns* under the lease which they held of *Moss Rigg Quarry*, for £6600 to be paid as follows: £2100 to *Poole* in cash, £500 to *Binns* in cash, and the residue in shares of the intended company, viz., 270 fully paid-up £5 shares to *Poole*, 290 like shares to *Binns*, 120 like shares to *Ashworth*, and 120 like shares to *Bland*.

On the 19th of April, 1886, the company was registered with a nominal capital of £30,000 divided into 6000 shares of £5 each. By the articles *Ashworth* and *Bland* were named directors, and it was provided that the company should at its first meeting

C. A.
1893
BLAND'S CASE.

elect as additional directors not fewer than three, or more than five, other members holding not less than fifty shares each.

The 4th article was as follows:—

"The directors shall forthwith adopt on behalf of the company and carry into effect (with or without modification) an agreement in writing dated the 16th of February, 1886, and made between *J. Poole, J. Ashworth, W. Binns,* and *A. Bland,* of the one part, and *J. S. Sawrey,* as trustee for and on behalf of the company of the other part, which agreement (hereinafter referred to as "the purchase agreement") has for the purpose of identification been indorsed with the signatures of the subscribers to these articles, and the validity of such agreement shall not be impeached on the ground that the directors of the company or any of them are interested therein as vendors or otherwise, or that they are the promoters of the company, nor shall they be accountable for the benefits secured to them, or which they or any of them may obtain under such agreement, and every member shall be deemed to have had notice of the terms of such agreement and to approve and sanction the same (modified or not as the case may be)."

On the 24th of April the first meeting took place, present *Sawrey, Binns, Bland,* and *Lee* (one of the subscribers to the memorandum of association). It was resolved to register the agreement as to fully paid-up shares and to confirm the purchase agreement pursuant to art. 4. The prospectus was produced, read, and approved, and *Poole, Binns,* and *Sawrey* were added as directors.

The purchase agreement was registered and filed on the 2nd of July, 1886, and was the only agreement relating to the issue of shares as fully paid up. *Bland* was entered on the register as holder from April, 1886, of 120 and 1 shares and *Ashworth* of 120 and 1, each having subscribed to the memorandum of association for one share.

The prospectus stated that "no promotion money will be paid."

On the 15th of July, 1886, a meeting of directors was held, at which *Bland* was present, and it was resolved that the vendors'

share certificates should be signed, sealed, and issued—which was accordingly done.

The company was unsuccessful, and was ordered to be wound up, and the list of contributories was settled in March, 1889. *Bland* was entered therein in the first schedule as a contributory in respect of 200 shares, and he was entered in the second schedule as holder of 120 fully paid-up shares.

In the course of the winding-up *Bland* was examined. In his cross-examination he admitted that up to the 16th of February, 1886, he had no interest in *Stone Dykes*, and that he had nothing to do with fixing the price at which the property was to be sold to the company.

On the 23rd of June, 1892, a contributory of the company obtained leave to issue a summons in the name of the official liquidator against *Bland*, asking for a declaration that *Bland* was liable to contribute to the assets £600 as compensation for his misfeasance in accepting whilst a director of the company 120 £5 shares in respect of the promotion of the company, and was also liable to contribute to such assets three further sums of £600 each as compensation for his misfeasance in issuing or permitting to be issued to *Poole*, *Binns*, and *Ashworth* 120 shares each in respect of their promotion of the company.

Mr. Justice *Kekewich* made an order declaring that *Bland* was liable to contribute to the assets £600 as compensation for his misfeasance while a director in accepting 120 fully paid-up £5 shares in the company in respect of the promotion thereof; and also the further sum of £600 as compensation for his misfeasance in permitting to be issued to *Ashworth* 120 fully paid-up £5 shares in the company in respect of the promotion thereof, and ordering him to pay those sums to the official liquidator within fourteen days from the date of the order, or seven days after service of the order.

Bland, appealed from this order.

Vernon R. Smith, for the Appellant:—

All four parties were vendors, and the 4th clause of the articles precludes the taking any objection on the ground that any of

C. A.
1893
BLAND'S CASE.

them were directors or promoters. There is therefore no misfeasance, and *Bland* cannot be charged for one.

Butcher, for the Respondent:—

This case falls within *Pearson's Case* (1). *Bland* figured as a vendor, but he had nothing to sell; he had no interest in the property, and the joining him as a vendor was an ingenious device for giving him promotion-money, though the prospectus contains a statement that no promotion-money would be paid; and the fact that he was a promoter was concealed from the company. It is a case of a director receiving a present from one of the promoters.

Vernon R. Smith, in reply:—

Bland rendered services to *Poole*, for which *Poole* gave him an interest in the property sold, and he was therefore a real vendor. It cannot be contended that this interest was given to *Bland* that he might concur in inducing the company to take the property. *Pearson's Case* was very different: there the promoter in fact took the director into his pay by giving him a present before the contract was completed.

LINDLEY, L.J.:—

Until our attention was called to the cross-examination of Mr. *Bland*, I thought that the Appellant had some case; but when the facts of the case are understood, it appears to me clear that Mr. Justice *Kekewich* was right. This is a novel and ingenious attempt to evade the law as to secret profits. Two gentlemen, *Poole* and *Binns*, were interested in certain quarries which they were desirous of making over to a company to be formed for the purpose. They employed *Ashworth* and *Bland* to assist them in getting up the company. By an agreement of the 16th of February, 1886, *Poole*, *Binns*, *Ashworth*, and *Bland* entered into an agreement to hand over the quarries to the proposed company in consideration of £2600 in cash, and £4000 in fully paid-up £5 shares, of which *Bland* and *Ashworth* were each to receive 120. On the same day a lease of part of the

(1) 5 Ch. D. 336.

property *Stone Dykes*, a lease of which *Poole* was entitled to call for, was granted to the four promoters. Now, if *Ashworth* and *Bland* had been *bonâ fide* owners of shares in *Stone Dykes*, and had been agreeing to sell their interests for shares in the new company, I think the order under appeal would have been wrong; but *Bland* admits that he had no interest whatever in *Stone Dykes* until his name was put into the lease on the day on which the agreement was made, and that he had nothing to do with fixing the purchase-money. This was nothing but a scheme to enable *Bland* and *Ashworth* to get from the company 120 paid-up shares each for their services in getting up the company. Is there anything in the articles to protect the transaction? Article 4 is relied on by the Appellant, and its words are very wide. But though *Poole*, *Binns*, *Ashworth*, and *Bland* knew all the facts of the case when the directors passed a resolution for adopting the agreement, what did the company know? The company knew that *Bland* and *Ashworth* were among the lessees of *Stone Dykes*, but they did not know that making them lessees was mere machinery to obtain for them payment for their services. This prevents the Appellant from claiming protection under the 4th article. The appeal will be dismissed.

BOWEN, L.J.:—

I agree.

LOPES, L.J., concurred.

Solicitors: *Patersons, Snow, Bloxam, & Kinder*, agents for *Gardiner & Jeffery, Bradford; Harper & Battcock.*

H. C. J.

STIRLING, J.
1893
March 17; April 29.

In re ST. JOHN STREET WESLEYAN METHODIST CHAPEL, CHESTER.

Charity—Wesleyan Chapel—Building Registered as a Place of Meeting for Religious Worship—"Endowment"—Voluntary Subscriptions—Jurisdiction of Charity Commissioners to require Accounts from Trustees of Chapel—Exemption—Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), ss. 62, 66.

In 1811 land was conveyed to trustees upon trust to erect thereon a Wesleyan chapel, and to collect money by pew-rents, contributions, or otherwise, and to stand possessed of the same, and also all rents, issues, and profits of the chapel and other erections which should be built on the land, upon trust to pay thereout the principal and interest of money borrowed in respect of the trust premises, and to apply the surplus for the support of the preachers for the time being stationed in the circuit of the chapel; and upon further trust, if necessary, to sell the property and apply the proceeds of sale in the purchase or erection of another more convenient chapel, and hold the same upon the like trusts. On the site so conveyed a chapel was erected, and used, and registered as a place of religious worship. Subsequently, adjoining pieces of land were purchased and conveyed to the trustees upon the same trusts. The purchase-money for the additional land was raised partly by subscriptions and collections, partly by money borrowed at interest, and partly by sale of other portions of the property. On the property so acquired buildings of various kinds were erected by means of legacies, subscriptions, and collections. One of such buildings was let by the trustees, and yielded a considerable rent. In 1881, on the application of the trustees, a scheme was settled by the Charity Commissioners for the future regulation of the charity, directing that the property should be held upon the trusts of the Wesleyan chapel model deed, which were somewhat wider than those of the original deed of 1811, and provided for the application of surplus income towards the general objects of Wesleyans. The Commissioners sought to compel the trustees to render accounts of the income and expenditure of the trust property. The trustees claimed exemption from the jurisdiction of the Commissioners under sect. 62 of the *Charitable Trusts Act*, 1853:—

Held, (1.) that the exemption in the section of "any building registered as a place of meeting for religious worship" only extended to the chapel itself, and not to the other buildings and property held therewith; (2.) that notwithstanding the extent of the objects for which the surplus income and the proceeds of sale were applicable the property, other than the chapel, was (in substance) held on "a particular and specific trust," and constituted, according to the decision in *Corporation of the Sons of the Clergy* v. *Sutton* (1), an "endowment" within the meaning of the

(1) 27 Beav. 651.

section; and (3.) that the property did not fall within either of the other exemptions in the section:

Held, therefore, that the trustees must render accounts of all the trust property except the chapel itself.

Motion.

This was a motion on behalf of the Charity Commissioners for *England* and *Wales*, asking for liberty to issue a writ of attachment against the trustees of certain trust property held in connection with a Wesleyan Methodist chapel in the parish of *St. John the Baptist, Chester*, for contempt of Court in refusing to comply with an order of the Commissioners dated the 23rd of September, 1892, whereby the trustees were ordered to deliver a statement in writing of the real and personal endowments and property belonging to the charity, and to furnish accounts of the income, revenues, receipts, and expenditure for the years ending the 31st of December, 1889, 1890, and 1891. The question at issue was whether the jurisdiction of the Commissioners did or did not extend to the charity.

By indentures of lease and release, the latter dated the 30th of July, 1811, *Thomas Jackson*, in consideration of a sum of £1300, conveyed a dwelling-house in *St. John Street, Chester*, and a piece of land adjoining, to fifteen trustees, in fee simple, upon trust to erect a chapel and permit the same to be used as a meeting-house by the religious society called Methodists in the connection of the late Rev. *John Wesley*, and to permit the persons duly appointed at the yearly conference of that body to use the said chapel for the purpose of preaching and performing all acts of religious worship; and upon further trust, by sale or mortgage of the chapel and trust premises or otherwise as therein mentioned, to raise such sum as might be expended in the erection of the chapel or in furnishing and completing the same; and upon further trust to collect and receive from the persons attending public worship sums of money by way of pew-rents or by way of contributions or otherwise, and to stand possessed of such sums, and also all rents, issues, and profits of the chapel, houses, and other erections which should be built on the property conveyed, and all other sums of money which should yearly or otherwise be collected and received under the trusts (except

STIRLING, J.

1893

In re St. John Street Wesleyan Methodist Chapel, Chester.

such collections as were commonly made by the preachers and leaders of classes or by the Conference or their special appointment) upon trust to pay thereout in the first place the interest on any sums borrowed in respect of the trust premises, and in the next place the principal sums so borrowed, and to pay and apply the surplus for and towards the support of the preachers for the time being stationed in the circuit in which the chapel should be comprised; and upon further trust, that in case at any time the society of Methodists usually assembling in the chapel should be dissolved or become extinct, or if, in consequence of any act of the Legislature, the chapel could not, consistently with the general system of the Methodist doctrines and discipline, be used as a place of religious worship by them, or in case the trustees, or the major part of them, for the time being should be of opinion that a larger or more convenient chapel should be necessary, to sell the property conveyed, and, after payment of any sums of money with which the property might be chargeable, to apply the surplus of the proceeds of sale towards the purchase or building of another more suitable and convenient chapel, and hold the same when so purchased upon the like trusts as therein expressed.

On the site conveyed by this deed a Wesleyan chapel was erected, which was still used as a place of religious worship, and had been registered as such with the Registrar-General of Births, Deaths, and Marriages. By deeds, dated respectively the 3rd of April, 1845, the 29th of March, 1863, and the 21st of June, 1866, several pieces of land adjoining the site of the chapel were conveyed to the trustees for the time being upon the trusts declared by the deed of the 30th of July, 1811. The purchase-money for the property acquired in 1845 appeared to have been raised, as to £427 17*s.*, part thereof, by subscriptions and collections (the subscriptions being paid by eight quarterly instalments), and as to £2050, the residue thereof, by money borrowed at interest. The sum of £2050 so borrowed was paid off in 1860 and 1861, as to part by a sale of a portion of the property acquired in 1845 for the sum of £1600, and as to the remainder by subscriptions and collections, made for the purpose of paying off not only this sum of £2050, but also other

moneys borrowed by the trustees for expenditure on the property acquired in 1811. The purchase-money for the property acquired in 1863 and 1866 appears to have been raised by subscriptions and collections. On the property so acquired buildings of various kinds were erected, the necessary funds being raised by means of subscriptions and collections, and to some extent by means of a legacy bequeathed to the trustees, "to be laid out and expended in building or erecting a vestry or vestries upon the property of the said trustees." One of the buildings so erected was now occupied as a post-office, and yielded a considerable rent. On the 27th of April, 1881, an application was made by the trustees for the time being to the Charity Commissioners for an order discharging from the trusteeship two trustees who were desirous of retiring, appointing new trustees, vesting the legal estate in the charity property, and establishing a scheme for the future regulation of the charity. On the 23rd of September, 1881, the Charity Commissioners made an order under the *Charitable Trusts Acts*, 1853 to 1869, discharging the two trustees who were desirous of retiring, appointing new trustees, vesting the property described in the schedule (of which it was stated on the face of the order that the endowment of the charity consisted) in the trustees, and directing by way of scheme that the chapel and other hereditaments should thenceforth be held upon the trusts of an indenture dated the 3rd of July, 1832, usually known as "the Wesleyan chapel model deed." The trusts of this deed were to build a chapel, dwelling-house, and vestry-room, school-room, and other offices on the site, to permit the chapel to be used as a place of religious worship by Methodists—the connection established by the late Rev. *John Wesley*—and to permit preachers appointed by the Conference to preach and perform the usual acts of religious worship therein, to let the pews and seats in the chapel, and also any dwelling-houses or school-rooms on the property, and to receive all rents and other income, "excepting moneys which shall from time to time arise from collections or subscriptions duly made therein according to the general rules of the said people called Methodists for other purposes than for the

STIRLING, J.
1893
In re St. John Street Wesleyan Methodist Chapel, Chester.

immediate purposes of the said trust estate;" to apply the money arising from the rents, profits, and income, "except as aforesaid," in payment of rates, taxes, insurance, and repairs, and of interest and principal moneys borrowed on the security of the trust premises, and of costs, charges, and expenses incurred in the execution of the trusts; in payment of the costs of cleansing, lighting, and attending to the chapel; and, as regards the surplus, for or towards the support of any preacher duly appointed by the Conference either in the circuit in which the chapel was situated or in any other circuit, or for assisting or increasing the funds of any other Methodist chapel, or building any new Methodist chapel, or "in subscribing or giving to any of the general funds, objects, or charities of the" Methodists. The trustees were empowered to mortgage the trust property for the purpose of securing such sums as might be necessary for the due execution of the trusts. Also, with the consent of the Conference, to sell all or any part of the trust property, and to apply the proceeds of sale, after discharging incumbrances and liabilities, "either for or toward promoting the preaching of the Gospel amongst" the Methodists "in the circuit where the said chapel shall for the time being be situated, or for the purpose of procuring a larger or more conveniently or eligibly situated piece of ground and chapel . . . . in the place of the said piece of ground and chapel . . . . to be settled upon the same trusts;" and also, "if at any time the income arising from the said piece of ground, chapel, or place of religious worship, hereditaments, and premises shall be inadequate to meet and discharge the interest of all moneys borrowed and then due and owing upon or on account of the said trust premises and the various current expenses attending the due execution of the trusts . . . . and also if the trustees or trustee for the time being . . . . shall desire to retire . . . . from the . . . . execution of the trusts, and if no . . . . proper persons . . . . can be found to take upon themselves the burden and execution of the said trusts," then without the consent of the Conference to sell and apply the proceeds of sale for the same purposes as prescribed with respect to any sale made with the consent of the Conference.

Sir *H. Davey*, Q.C., and *Vaughan Hawkins*, for the Charity Commissioners:—

The trustees of the charity have declined to render accounts, upon the ground that they are within some or one of the exemptions contained in sect. 62 of the *Charitable Trusts Act*, 1853.

That section enacts that the Act shall not extend "to any building registered as a place of meeting for religious worship with the Registrar-General of Births, Deaths, or Marriages in *England* and *Wales*, and *bonâ fide* used as a place of meeting for religious worship." We submit that that exemption relates exclusively to the building which is actually registered and *bonâ fide* used, and does not extend to all property which is held as appurtenant to the building. The only building which is registered is the chapel itself, and we, of course, concede that that is exempted. That it is only the building registered and used for the purpose of public worship which is exempted is quite clear from the section itself; but if there be any doubt upon the point, it is set at rest by sect. 15 of the *Charitable Trusts Act*, 1869, which brings the exempted charities within the provisions of the *Charitable Trusts Acts* for certain purposes if the trustees think fit.

Hastings, Q.C., for the trustees:—

We admit that the chapel itself is the only building which comes within the first exemption. The exemption of the other property is based on other grounds.

Sir *H. Davey*:—

The 62nd section goes on to exempt "any establishment or society for religious or other charitable purposes.... wholly maintained by voluntary contributions." That clearly does not apply to this charity. The section proceeds: "And where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last

STIRLING, J.

1893

In re St. John Street Wesleyan Methodist Chapel, Chester.

aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said Board, or the powers or provisions of this Act." Dealing, first, with the second part of that clause, in order that the exemption contained in it may apply, two conditions are necessary: first, there must be no special application or appropriation of the donation or bequest by the donor or testator; and, secondly, it must be legally applicable by the governing or managing body of the charity as income. Those conditions are not fulfilled in the present case.

The next exemption in the section is: "No portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said Board or the powers or provisions of this Act."

The meaning of that is that the governing body cannot by a temporary and revocable appropriation of property, given for the general purposes of the charity, to some particular object, take such property out of the preceding exemption. The object of the section is to exempt from the operation of the Acts everything which is derived from voluntary subscriptions, and which is held for the general purposes of the charity, and may be applied either as income or capital. It is for the trustees to bring this endowment within one or other of the exemptions. We submit that it is not within either of them. A special appropriation is directed by the founders of the charity—that is, the persons who collected the contributions or the moneys by which the property was purchased. The trusts of the deed

under which the property is held amount to a special and particular appropriation of it to the object of providing for the maintenance of the preacher who is duly appointed to conduct the services in the chapel. Then, it does not come within the next exemption, because the trusts upon which the property is held were not imposed by a rule or resolution of the governing body; but the property vested in the trustees came to their hands under circumstances which rendered it applicable for specific purposes only.

But the principal question is whether this property constitutes an endowment. "Endowment" is defined, in sect. 66 of the Act of 1853, as "all lands and real estate whatsoever, of any tenure, and any charge thereon, or interest therein, and all stocks, funds, monies, securities, investments, and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof."

That is a very wide definition, and cannot be narrowed so as only to include a gift appropriated for some specific purpose with reference to the charity. We submit that it includes property and income which is applicable to the general purposes of the charity, as well as property the income of which is applicable only to some specific purpose in connection with the charity; and that being so it cannot be said that this charity is not supported by income arising from any endowment.

The trustees rely upon certain cases which have come before the Courts upon this section. The first is the *Corporation of the Sons of the Clergy* v. *Sutton* (1); but what Lord *Romilly* said there about the construction of the section was not necessary for the decision of the case before him. Lord *Romilly* said that the question would seem to be whether the property comes within the meaning of the word "endowment" as employed in the section in contradiction to "voluntary contribution." That is not the true distinction. The true distinction for the purpose of this exemption is not between voluntary contributions and endowment, but between voluntary contributions *de anno in annum* and the income of endowment. The next case is the

(1) 27 Beav. 651.

STIRLING, J.

1893

In re St. John Street Wesleyan Methodist Chapel, Chester.

Royal Society of London and Thompson (1). There again the decision is no doubt correct; but we submit that the ground upon which Vice-Chancellor *Hall* put it is wrong, because what he looked at was the source out of which the land had been purchased, and not the distinction whether the land had become an endowment so that the income only could be applied to the purpose of the charity.

Again, the case of *Finnis to Forbes* (2) was no doubt rightly decided; but it does not assist the trustees in this case.

The most recent case is *In re Corporation of the Sons of the Clergy and Skinner* (3), the head-note in which is rather startling; but it probably expresses in too general a form what the learned Judge only intended to apply to the particular charity before him. Every one of the cases subsequent to that decided by Lord *Romilly* really follows the decision of that learned Judge, who, we submit, did not grasp the true distinction in this Act, and placed too narrow a construction upon the meaning of the word "endowment" in the 62nd section.

The true distinction is that "endowment" is properly regarded as a fruit-bearing source. If the charity is maintained partly by voluntary subscriptions and partly by the income of an endowment, and it cannot be said that the endowment derives its origin from a rule or resolution of the governing body made in the exercise of their powers of management, then it is exempt except as to the income of the endowment. It cannot be denied that this charity is supported by the income of an endowment. It is no answer to say that the money was in the first place voluntarily contributed.

Hastings, Q.C., and *Percy Bunting*, for the Respondents, the trustees of the chapel:—

No part of this property is within the jurisdiction of the Charity Commissioners. It is conceded by the Commissioners that whatever is included in the registration of the building is exempted. But we say that the rest of the property is also exempted, because it has arisen solely from voluntary contributions.

(1) 17 Ch. D. 407. (2) 24 Ch. D. 591. (3) [1893] 1 Ch. 178.

If we were proposing to sell the post-office site, for instance, the case would be exactly covered by the decision of Lord *Romilly* in *Corporation of the Sons of the Clergy* v. *Sutton* (1). The sale of a property which is exempt cannot stand on any different footing from the property itself, and if the consent of the Commissioners would not be required to the sale of the property, then the income of the property cannot be otherwise than exempt from their jurisdiction.

The whole scope of the trust in this case is to apply the property for the general purposes of the charity, although, no doubt, it may include specific objects, and, that being so, it cannot be said that there is a special application or appropriation within the section. Where a collection is made after a sermon, it cannot be said that the money so collected is specially appropriated by the contributors. It must be assumed that the collections were made for the general purposes of the charity. They may have been made to clear off debts previously incurred; but that is not appropriation to a specific purpose within the section.

Again, this property comes precisely within the language of the latter part of the section—it is "a donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid." The Court will assume that when the purchase was made, it was made in pursuance of some "resolution of the governing body."

[Stirling, J.:—*Hall*, V.C., seems to have thought that though the property might be sold without the sanction of the Charity Commissioners, yet the income might nevertheless be not exempted; and it would seem that Mr. Justice *North* thought the same.]

The result would be extraordinary that under the first exemption both the capital and the income are exempted, yet, under the latter part of the section, though the capital is exempted, the income is not. We submit that the income arising from the post-office is exempt.

Then it is said that the charity cannot be exempt because it is regulated by a scheme of the Commissioners. But the mere

(1) 27 Beav. 651.

STIRLING, J.
1893
In re St. John Street Wesleyan Methodist Chapel, Chester.

establishment of a scheme does not bring the property within the jurisdiction if it is otherwise exempt. That is clear from sect. 15 of the *Charitable Trusts Act*, 1869.

Further, we say that the exempting clause in sect. 62 is not confined to buildings alone, but extends to the estates. The section exempts the universities, and cathedral or collegiate churches, &c., and clearly includes their estates as well; therefore the estates of buildings registered as places of worship are also included in the exemption. The reference to the building is not as a matter of bricks and mortar, but as an identification of the particular kind of charity which is exempted by the section.

Vaughan Hawkins, in reply:—

The words "university," "college," "cathedral," &c., are used in the sense of corporations possessing property, and not in the sense of buildings. "Cathedral," for instance, is used in a sense in which it is to include corporate revenues. But there is nothing analogous to that when you speak of a mere building registered as a place of worship.

[STIRLING, J., referred to *Grant* on Corporations (1).]

The word "cathedral" may be used in a sense including property, but the word "building" cannot be so used. If the word building is to be construed in a *quasi* corporate sense, it is difficult to see what would be the result, and where the exemption would cease.

The general proposition, that property purchased by means of subscriptions collected, even for a particular purpose, is exempt from the jurisdiction of the Commissioners, is too wide. The object and meaning of the section is to exempt what may be called purely spending societies carried on by voluntary subscriptions. In the case of the *Corporation of the Sons of the Clergy* v. *Sutton* (2), the charter of that society was such that whatever they had given to them they could spend as income for all time; there was no particular appropriation of it. That was the whole point of the case. Whatever was given to the

(1) Page 529. (2) 27 Beav. 651.

society remained, by its charter, in the condition of voluntary subscriptions, and accordingly fell within the exemption in sect. 62. That decision cannot affect a case like the present, where property is settled permanently, as by this Methodist trust deed. The power in the deed to sell the property and spend it as income does not prevent its being an endowment: *In re Sir Robert Peel's School at Tamworth* (1). The chief question is whether the trustees can bring this case within the third exemption. The burden lies upon them to shew that there is no special appropriation, and that they have failed to do.

April 29. Stirling, J. (after stating the facts of the case, continued):—

The order of the Charity Commissioners of the 23rd of September, 1892, is based on sect. 10 of the *Charitable Trusts Act*, 1853, which authorizes them to require such accounts and statements from "all trustees or persons acting or having any concern in the management or administration of any charity, or the estates, funds, or property thereof." By sect. 66 "charity" is defined to mean "every endowed foundation and institution taking or to take effect in *England* or *Wales*, and coming within the meaning, purview, or interpretation of the statute of the 43rd year of Queen *Elizabeth*, c. 4, or as to which, or the administration of the revenues or property whereof, the Court of Chancery has or may exercise jurisdiction;" and "endowment" is defined to mean and include "all lands and real estate whatsoever, of any tenure, and any charge thereon, or interest therein, and all stocks, funds, moneys, securities, investments and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof." Pausing there, I may observe that there can be no question that the property conveyed by the deeds of 1811, 1845, 1863, and 1866 is held on trust for a charity, and that the Court of Chancery might have exercised jurisdiction as to the administration of such property and the revenues arising therefrom. Sect. 62, however, exempts certain charities from the operation of the Act, and, amongst others, "any building registered as a place

(1) Law Rep. 3 Ch. 543.

STIRLING, J.
1893
In re St. John Street Wesleyan Methodist Chapel, Chester.

of meeting for religious worship with the Registrar-General of Births, Deaths, or Marriages in *England* and *Wales*, and *bonâ fide* used as a place of meeting for religious worship." It is conceded by the Charity Commissioners that their order of the 23rd of September, 1892, cannot extend to so much of the property vested in the trustees as falls within the description of such a building; but, as already stated, such property comprises much which cannot be so described. It is contended on behalf of the trustees that the whole of the property falls within this description. Immediately preceding the words which I have just read are the words "any cathedral or collegiate church," and at the close of sect. 62 it is provided "that the said exemption shall not extend to any cathedral, collegiate, chapter, or other schools." It is said that the exemption of "any cathedral or collegiate church" must extend to all property applicable for the purposes of such cathedral or church, and that in like manner the exemption of "any building registered as a place of meeting for religious worship," &c., must extend to all property applicable for the purposes of such building. On this it is to be observed that "a cathedral or collegiate church" is not (as was suggested in argument) a mere building, but is, in the eye of the law, very much more. The *status* of such churches is discussed at great length in *Phillimore's* Eccl. Law (1); for my purpose it will be sufficient to refer to some of the statutes and documents relating to the foundation of these churches by King *Henry* VIII. By 31 Hen. 8, c. 9, the King was empowered "to declare and nominate, by his letters patent . . . such number of bishops, such number of cities (sees for bishops), cathedral churches, and dioceses . . . and to endow them with such possessions, after such manner, and form and condition, as to him" should "be thought necessary and convenient." In pursuance of this power, the King founded and endowed several cathedral and collegiate churches, and the form of the letters patent of foundation is given in *Phillimore's* Eccl. Law (2). They run thus: *Nos . . . quandam ecclesiam cathedralem, de uno decano presbytero, et quatuor presbyteris præbendariis . . . creari, erigi, fundari, et stabiliri decrevimus; et eandem ecclesiam cathedralem, de uno decano presbytero, et*

(1) Vol. i. pp. 147, *et seq.* (2) Vol. i. p. 175.

quatuor præbendariis presbyteris . . . tenore præsentium, realiter et ad plenum creamus erigimus," &c. In the following reign was passed an Act, 1 *Mary*, Sess. 3, c. 9, which recites that King *Henry* VIII. did "erect, make and establish divers and sundry churches, as well cathedral as collegiate, and endowed every of the same with divers manors, lands, tenements, and possessions, for the maintenance of the deans, prebendaries, and ministers within the same, and for other charitable acts to be done by the same deans, prebendaries, and ministers." In my opinion the term "cathedral or collegiate church," as used in sect. 62 of the *Charitable Trusts Act*, 1853, bears the same sense as in the Act of *Mary* which I have just quoted—a sense closely analogous to that of the words, "colleges and halls" in the immediately preceding context. The section proceeds to exempt from the operation of the Act Roman Catholic charities in the widest terms, and also "any institution, establishment, or society for religious . . . purposes" if "wholly maintained by voluntary contributions." Now, to accede to the contention on behalf of the Respondents would be to decide that property held in connection with or for the purpose of places of religious worship duly registered and *bonâ fide* used as such is exempt from the jurisdiction of the Charity Commissioners. Looking at the context of the section, I cannot but think that if this had been the intention of the Legislature the exemption would not have been limited to "any building registered as a place of meeting for religious worship with the Registrar-General . . . and *bonâ fide* used as a place of meeting for religious worship," but would have been expressed in wider and more appropriate terms. In my opinion, therefore, the trustees cannot under this exemption entirely escape from the jurisdiction of the Commissioners. The next exemption to be considered is in these terms—"Where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof." Now, the meaning of the word "endowment" as here used was considered by Lord *Romilly*, M.R., in the case (decided in 1860) of the *Corporation of the Sons of the*

STIRLING, J.

1893

In re St. John Street Wesleyan Methodist Chapel, Chester.

Clergy v. *Sutton* (1). In that case the charity was incorporated by a Royal charter granted in 1678, which empowered the corporation to purchase, have, take, receive, and enjoy in fee and perpetuity lands and hereditaments not exceeding a certain yearly value, and to sell and dispose of such lands and hereditaments. The question arose whether a sale of lands purchased by the corporation out of the general funds contributed to its support and conveyed simply to the corporation and its successors required the approval of the Charity Commissioners under sect. 29 of the *Charitable Trusts Act*, 1855, the provisions of which (by sect. 48) do not extend to "any charity or institution expressly exempted from the operation of the Act of 1853." Lord *Romilly* held that such approval was not required. His Lordship says (2): "The question is, whether the consent of the Charity Commissioners is required to render the sale of this real estate valid. The facts stated shew that no special trust attached to this property, but that it was to be applied for the general objects of the charity. The question depends on the construction of the 16 & 17 Vict. c. 137, s. 62; upon this, the question would seem to be, whether the property comes within the meaning of the word 'endowment,' as employed in this section, in contradiction to 'voluntary contribution.' The expression voluntary contributions must not be confined to annual subscriptions; it must clearly extend to donations; and if so, it cannot be confined to donations below any specified amount; it is equally applicable to £1000 as it is to £1. It is clear also, that the word 'endowment' would extend to and include any sum given for a specific and peculiar trust or object in connection with the particular charity. But the difficulty is this: at what point and under what condition does a donation become an endowment within the meaning of this section? The word 'endowment' is not used here in its ordinary and popular sense; so used it is impossible to distinguish between a donation and an endowment. In ordinary parlance, a man who granted an annuity of £100 out of his landed estate to the Corporation of the Sons of the Clergy would be said to endow it. In like manner, a man who gave £2000 at once to the corporation would be said to have

(1) 27 Beav. 651. (2) 27 Beav. 661.

endowed it. The section speaks of the 'income arising from endowment.' If the word 'endowment' has reference to the production of an annual income only, the fact that the corporation invested its contributions in any permanent investment would alter the character of the money bestowed, and convert it from a contribution into an endowment; but it is impossible that the Legislature can have meant to make the control of the Charity Commissioners dependent upon the circumstance whether or not the affluence or providence of the society had enabled or induced it to secure a portion of its funds by an investment in a permanent security." And a little further on he says: "My opinion, therefore, founded on the consideration of this section, taken by itself alone, is, that the word 'endowment' has reference to an endowment made for some specific or particular purpose or trust. I use the words 'specific or particular purpose or trust' advisedly, because a gift of a sum of money to the corporation *simpliciter*, or a gift in trust for the furtherance of the objects and purpose for which the corporation was established, would be various ways of accomplishing the same end, namely, making a donation to the corporation itself. What words would amount to and constitute a 'particular and specific trust,' so as to bring a bequest or donation within the meaning of the word 'endowment,' according to the sense in which it appears to have been used in this section, taken alone, it is not necessary for the present purpose to consider, as no such question arises, when it does, the Court must determine it." The same construction was adopted by Vice-Chancellor *Hall* in *Royal Society of London and Thompson* (1), which arose with reference to a different corporation, but under circumstances similar to those of the case before Lord *Romilly*. The Vice-Chancellor says with reference to that part of sect. 62 which I have last read: "That provision is in effect an exemption of this charity from the operation of the Act, except as to endowments in which purposes of the charity are particularly specified." In *In re Corporation of the Sons of the Clergy and Skinner* (2), Mr. Justice *North* had to consider the same point with reference to the same charitable corporation as was dealt with by Lord *Romilly*, M.R., with this difference—

(1) 17 Ch. D. 407, 414. (2) [1893] 1 Ch. 178.

STIRLING, J.

1893

In re St. John Street Wesleyan Methodist Chapel, Chester.

that the property then in question had been conveyed to the corporation by a voluntary settlement and was not an investment of part of the general funds; and the learned Judge came to the same conclusion as Lord *Romilly*, and adopted his interpretation of the term "endowment" (1). The same view, I understand, to have been taken by Vice-Chancellor *Bacon* in *Finnis to Forbes* (2), where he had to consider the case of an unincorporated charity, and held that a school-house conveyed to the trustees of a school supported by voluntary contributions in trust to convey the same to such persons being directors of the charity as the directors or the major part of them should from time to time direct and appoint, upon trusts for sale, and in the meantime till sale to occupy the premises as a school-house, with power to lease and apply the income for the benefit and general purposes of the charity, was not within the Acts. I have been asked to put a different interpretation on the term "endowment" as used in the *Charitable Trusts Act*, 1853. It is obvious that the conclusion adopted by Lord *Romilly* was not arrived at without difficulty, and it may be that if the matter were *res integra* some other view might commend itself; but I conceive that I am not at liberty to depart from that which has for a period of over thirty years been treated by a succession of Judges as the true construction of the Act, more particularly when the title to land might be affected; and I think that I am bound to hold that the word "endowment" in this section means, in the language of Lord *Romilly*, "the devotion of property to a specific and particular trust." The question remains whether this property (excepting, of course, such part of it as consists of a building registered as a place of religious worship) has been so devoted. Originally all was held upon the trusts of the deed of 1811, under which the income was applicable for the payment of interest and principal borrowed in execution of the trusts, and (as to the surplus) for the support of the preachers for the time being stationed on the circuit in which the chapel should be situated; and the proceeds of any sale were to be reinvested in land to be held upon the like trusts. I think that this constituted "a particular and specific trust" within the meaning

(1) [1893] 1 Ch. 185–7. (2) 24 Ch. D. 591.

of Lord *Romilly*; and it seems to me that only on this view can the order made by the Charity Commissioners in 1881 be justified. Previously to 1869 the Commissioners had no jurisdiction with respect to buildings registered as places of religious worship; but by sect. 15 of the *Charitable Trusts Act*, 1869, a limited jurisdiction with reference to such buildings was conferred. Their order, however, extends to and deals with much property besides the registered buildings, and in my opinion could only have been properly made if the property (other than the registered buildings) constituted an endowment within the meaning of sect. 62 of the Act of 1853, and thus fell within the general jurisdiction of the Commissioners. Under the scheme of 1881, the income is primarily applicable for the repair and maintenance of the chapel; the trusts of the surplus are much wider than those of the deed of 1811, extending to the support of preachers in any circuit, the assistance or building of any other chapel, and any of the general funds, objects, or charities of the Methodists. The proceeds of sale (under powers which arise only on the occurrence of special circumstances) are applicable, after the discharge of incumbrances or liabilities, "either for or towards promoting the preaching of the Gospel among the Methodists in the circuit in which the chapel may for the time being be situated, or for the purpose of procuring a larger or more convenient chapel." I think that the primary object intended to be attained by the income of the property is the maintenance of the existing chapel as a place of religious worship, and that, notwithstanding the extent of the objects for which the surplus income and the proceeds of sale are made applicable, the property is held (in substance) on "a particular and specific trust." I think, therefore, that this exemption does not relieve the trustees from the obligation of rendering accounts of the income of the property other than that which consists of any building duly registered as a place of religious worship and *bonâ fide* used as such. The next exemption relied on is in these terms: "No donation or bequest unto or in trust for any such charity . . . of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing

STIRLING, J.

1893

In re St John Street Wesleyan Methodist Chapel, Chester.

body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this Act." In order that this exemption may arise with respect to any donation, two conditions must exist—first, no special application or appropriation must be directed by the donor; and, secondly, it must be legally applicable by the governing or managing body in aid of income. The trustees acquired the property held under the deeds of 1845, 1863, and 1866, by means of subscriptions and collections; and though the evidence is not so satisfactory as could be wished, it appears to me that these were given, not for the general purposes of the chapel, but for specific purposes; and that they could not have been applied as income. If, therefore, these subscriptions and collections are regarded as constituting the "donations," then neither element necessary for the exemption is found to exist. If, on the other hand, the donations were given by the several trust deeds, then I think that (for the reasons already given), a special application or appropriation of the property comprised in them was thereby directed. On this, I may refer to the judgments of the Lords Justices in *In re Sir Robert Peel's School at Tamworth* (1). Lastly, the Act proceeds: "No portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said board or the powers or provisions of this Act." The first part of this clause appears to me to apply to funds arising from donations, bequests, or voluntary subscription, which came in the first instance to the hands of the governing or managing body unfettered by any special appropriation or trust, and were subsequently, by a rule or resolution of the managing or govern-

(1) Law Rep. 3 Ch. 543, 549, 554.

ing body, set apart for some defined object. The second part applies to donations or bequests in aid of such funds. Now, all the property vested in the trustees appears to me to have come to their hands under circumstances which rendered it applicable for specific purposes only; and it was for that reason and not by virtue of any rule or resolution of the governing body that such property became subject to the trusts of the deed of 1811. I think that this exemption is inapplicable. I hold, therefore, that the Commissioners are entitled to require accounts of so much of the trust property as does not consist of any building registered as a place of meeting for religious worship with the Registrar-General of Births, Deaths, and Marriages in *England* and *Wales* and *bonâ fide* used as a place of meeting for religious worship.

Solicitor for the Charity Commissioners: *J. M. Clabon.*

Solicitors for the trustees: *Rowcliffes, Rawle, & Co.*, agents for *Cooper & Sons, Manchester.*

G. A. S.

KEKEWICH, J.

1893

March 10, 16, 29.

In re MANCHESTER, MIDDLETON, AND DISTRICT TRAMWAYS COMPANY.

Tramway Company — Railway Company — Paper Company — Abandoned Undertaking—Parliamentary Deposit, Application of—Solicitor—Parliamentary Agent — Creditors, Meritorious and Non-Meritorious — Parliamentary Deposits and Bonds Act, 1892 (55 & 56 *Vict. c.* 27), *s.* 1.

Where the undertaking, authorized by Parliament, of a tramway or other company has been abandoned, all the creditors of the company, including the solicitor or parliamentary agent, concerned in the promotion of the bill in Parliament, are, as between themselves and the depositors, entitled, under sect. 1, sub-sects. 1 and 2, of the *Parliamentary Deposits and Bonds Act,* 1892, to be paid out of the parliamentary deposit in priority to the depositors. But, in a case in which the company was a "paper company," that is, a company which never had any existence beyond statutory incorporation, and there was a contest between several claimants to the deposit, including the solicitor and parliamentary agent who had been instrumental in obtaining the passing of the company's Act, it was *held,* under the particular circumstances, that none of the claimants were entitled to rank as creditors.

By the *Manchester, Middleton, and District Tramways Act,* 1885, incorporating the *Companies Clauses and Lands Clauses Acts,* it was enacted (s. 4) that "*Richard Robinson, Joseph Cunard Morrow,* and all other persons and corporations who have already subscribed to or shall hereafter become proprietors in the undertaking, and their executors, administrators, successors and assigns respectively," were incorporated by the name of "the *Manchester, Middleton, and District Tramways Company,*" with powers to make certain tramways in and about the neighbourhood of *Manchester.*

Sect. 9 recited that the necessary parliamentary deposit had been made, and contained provisions for the return of the deposit fund to the depositors on the completion of the undertaking.

Sect. 10 was as follows: "If the company do not, previously to the expiration of the period limited for the completion of the tramways, complete the same and open them for the public conveyance of passengers, then and in every such case the deposit fund, or so much thereof as shall not have been paid to the depositors, shall be applicable and after due notice in the *London*

Gazette shall be applied towards compensating any landowners or other persons whose property has been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the tramways or any portion thereof, or who have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act, and for which injury or loss no compensation or inadequate compensation has been made, and also in compensating all road authorities for the expense incurred by them in taking up any tramways or materials connected therewith placed by the company in or on any road vested in or maintainable by such road authorities respectively, and in making good all damage caused to such roads by the construction or abandonment of such tramways, and shall be distributed in satisfaction of such compensation as aforesaid in such manner and in such proportions as to the Chancery Division of the High Court of Justice in *England* may seem fit; and if no such compensation is payable, or if a portion of the deposit fund has been found sufficient to satisfy all just claims in respect of such compensation, then the deposit fund, or such portion thereof as may not be required as aforesaid, shall either be forfeited to Her Majesty, and accordingly be paid or transferred to or for the account of Her Majesty's Exchequer in such manner as the Chancery Division thinks fit to order on the application of the Solicitor to Her Majesty's Treasury, and shall be carried to and form part of the Consolidated Fund of the *United Kingdom*; or in the discretion of the Chancery Division, if the company is insolvent and has been ordered to be wound up, or a receiver has been appointed, shall wholly or in part be paid or transferred to such receiver or to the liquidator or liquidators of the company, or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof. . . ."

By other special Acts passed in 1887, 1888, 1889, and 1890, the time for completing the tramways was extended. At the end of each Act there was the usual clause that the costs of obtaining the Act should be paid by the company. The said *Richard Robinson* and *Joseph Cunard Morrow*, and also *Isaac Jackson Morrow*, since deceased, a brother of the latter, were the

KEKEWICH, J.
1893
In re MANCHESTER, MIDDLETON, AND DISTRICT TRAMWAYS COMPANY.

promoters of the company, and Messrs. *Elmslie, Forsyth & Elmslie* acted as solicitors in the passage of the company's bills through Parliament.

The necessary parliamentary deposit of £2710 3*s.* 3*d.* Consols in respect of the company's bill of 1885 was provided by Messrs. *Robinson, J. C. Morrow,* and *I. J. Morrow,* who borrowed the amount from Messrs. *Dimsdale, Fowler, Barnard & Dimsdale,* bankers, on the security of a charge on the deposit.

The company's powers expired on the 14th of August, 1891, it having turned out a complete failure, for only a very small part of its capital had been issued, no notices to treat had been given, no lands had been purchased, and no work at all had been even begun. No receiver had been appointed, nor had the company been ordered to be wound up. In short, beyond its incorporation by the Act of 1885, the company never had any active existence at all, though it was said to have so far shewn signs of life as to pass some resolutions, apparently by Messrs. *Robinson,* and *J. C. Morrow,* who purported to act as directors, and were in fact the only members of the company, proceedings which were said to be irregular. The company's last Act, that of 1890, recited that a contract had been entered into by the company for the construction of the tramways, but nothing was ever done under that contract.

The question as to the parties now entitled to the deposit fund, having regard to the recent *Parliamentary Deposits and Bonds Act,* 1892, was raised by three summonses; one by Messrs. *Elmslie, Forsyth & Elmslie,* claiming payment thereout of a sum of £1944 for costs alleged to have been incurred by them as solicitors to the company's several bills, and for which they had recovered summary judgment, their case being that, in acting as solicitors to the bill of 1885, they took instructions from the three promoters, and that, with regard to the subsequent bills, they acted as solicitors to the company, taking their instructions from the directors; a second by the *Globe Industrial and General Trust Corporation, Limited,* claiming to be judgment creditors of the company for £2253 12*s.* 9*d.* on a *Lloyd's* Bond, the consideration for which was an advance by the corporation to the company for the expenses of carrying through their bill of 1890; and a third

by Mrs. *Hanly*, the widow and legal personal representative of Mr. *C. J. Hanly*, deceased—who had acted as parliamentary agent in obtaining the special Acts of 1885 and 1887, and was said to have been formally adopted as the parliamentary agent to the company by an agreement and resolution of the company, both in 1888, but alleged to have been irregular—the claim being for a balance of £1326 16*s.* 11*d.* for work done and money expended, and for which balance the claimant had recovered summary judgment. All three summonses were opposed by Messrs. *Dimsdale, Fowler, Barnard & Dimsdale*, claiming the whole fund as assignees of Messrs. *Robinson, J. C. Morrow*, and *I. J. Morrow*, the depositors.

Warmington, Q.C., and *C. E. E. Jenkins*, for Messrs. *Elmslie, Forsyth & Elmslie*:—

The undertaking having been "abandoned," we ask, under sect. 1, sub-sect. 2, of the *Parliamentary Deposits and Bonds Act*, 1892 (1), that a sufficient part of the deposit fund may "be

(1) The material part of sect. 1 of the *Parliamentary Deposits and Bonds Act*, 1892, is as follows:—

Sect. 1: "(1.) Where in pursuance of any general or special Act of Parliament, or of any rules made thereunder, moneys or securities have been deposited with, or are standing in the name of, the Paymaster-General to secure the completion by any company of any undertaking authorised by Parliament, or by any certificate issued under the authority of an Act of Parliament, and the undertaking has not been completed within the time limited in that behalf, the High Court may, notwithstanding anything in any such general or special Act or rules, order that the moneys or securities (in this Act called the deposit fund), or any part thereof, be applied towards compensating any landowners or other persons whose property has been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the undertaking, or any portion thereof, or who have been subjected to injury or loss in consequence of any compulsory powers of taking property given in connexion with the undertaking, and have received no compensation or inadequate compensation for such injury or loss; and also, in the case of a tramway company, towards compensating the road authorities for the expenses incurred by them in taking up any tramway or materials connected therewith placed by the tramway company in or on any road vested in or maintainable by the road authorities, and in making good all damage caused to such roads by the construction or abandonment of the tramway.

"(2.) Subject to payment of any such compensation, and notwithstanding any provision as to forfeiture to the Crown, the High Court may, if a receiver has been appointed, or the company is insolvent and has been ordered to be wound up, or the under-

KEKEWICH, J.
1893
In re MANCHESTER, MIDDLETON, AND DISTRICT TRAMWAYS COMPANY.

applied as part of the assets of the company" for our benefit as "creditors thereof." There can be no question as to our being "creditors" of the company, and therefore we are expressly provided for by the general Act: *In re Colchester Tramways Company* (1)—a case upon rule 22 of the Board of Trade Rules of August, 1886, which rule is substantially the same as sect. 1, sub-sects. 1 and 2, of the Act. The old distinction between "meritorious" and "non-meritorious" creditors, which arose under the *Railways Abandonment Act*, 1869, in *In re Barry Railway Company* (2), and other cases, and according to which claims for the promotion of a company could not be paid out of the deposit, has now been abolished by this new Act, and promoters are now entitled to rank equally with other creditors.

Renshaw, Q.C., and *Chubb*, for the *Globe Industrial and General Trust Corporation*:—

The law laid down in *In re Lowestoft, Yarmouth and Southwold Tramways Company* (3) and *In re Birmingham and Lichfield Junction Railway Company* (4), that persons concerned in the promotion of a company are not "meritorious creditors," and therefore not entitled to share in the distribution of the parliamentary deposit, is now rendered obsolete by the Act of 1892, that Act having created a change of policy. The creditors are entitled to come in before the depositors.

Swinfen Eady, for Mrs. *Hanly*, took the same view as Messrs. *Elmslie*.

Alexander, Q.C., and *J. G. Fawcus*, for Messrs. *Dimsdale, Fowler, Barnard & Dimsdale*:—

We say that none of the other claimants are entitled to share

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taking has been abandoned, order that the deposit fund or any part thereof be paid or transferred to the receiver or to the liquidator of the company, or be applied as part of the assets of the company for the benefit of the creditors thereof.

"(3.) Subject to such application as aforesaid the High Court may, after such public notice as to the Court seems reasonable, order that the deposit fund or any part thereof be paid or transferred to the depositors or the persons claiming through or under them."

(1) [1893] 1 Ch. 309.
(2) 4 Ch. D. 315.
(3) 6 Ch. D. 484.
(4) 28 Ch. D. 652.

in this fund, as they were all concerned as promoters of the company, and that payment of the deposit to non-meritorious creditors is no more to be allowed now than before the Act of 1892. If the Legislature had intended to sweep away the distinction that existed between the two classes of creditors, they would have said so in express terms. This company was nothing but a "paper company," it never having carried on business or acquired a particle of land; and therefore, in the absence of express terms, no inference should be drawn in favour of promoters who brought such a company into existence.

The question as to the destination of this deposit really depends upon sect. 10 of the company's own Act of 1885—a section which, so far as regards creditors, is identical with sect. 1, sub-sects. 1 and 2, of the general Act of 1892, except that sub-sect. 2 introduces the words "or the undertaking has been abandoned," words which do not appear in the special Act of 1885; but the object of the insertion of those words was merely to avoid the necessity, which previously existed, of coming to Parliament for a special Act authorizing the abandonment of a railway. There is nothing in sub-sect. 2 expressly overriding the distinction between meritorious and non-meritorious creditors established by the authorities. *In re Lowestoft, Yarmouth and Southwold Tramways Company* (1) and *In re Birmingham and Lichfield Junction Railway Company* (2) are cases under Board of Trade rules and statutory enactments identical with sect. 10 of the special Act in the present case, and exclude parliamentary agents and others concerned in the promotion of the company. The principle was that, on the failure of a tramway or railway company, it was considered unjust that the deposit should be applied for the benefit of persons equally responsible for the failure with the promoters themselves. The Act of 1892, sect. 1, sub-sect. 2, still leaves a discretion to the Court, for it says that the Court "may"—not "shall"—order the deposit to be applied for the benefit of creditors. Surely the meaning of that is to reserve to the Court the discretion it previously had; and it can only exercise that discretion by drawing a distinction between meritorious and non-meritorious creditors. The object of the

(1) 6 Ch. D. 484. (2) 28 Ch. D. 652.

KEKEWICH, J.
1893
In re MANCHESTER, MIDDLETON, AND DISTRICT TRAMWAYS COMPANY.

Act is, first, to substitute the depositors for the Crown; and, secondly, to enable the Court alone to deal with the fund where an undertaking has been abandoned (and so save an application to Parliament authorizing the abandonment of the undertaking), and the return of the deposit to the depositors. The distinction between meritorious and non-meritorious creditors has been recognised, since the Act of 1892, in *In re Colchester Tramways Company* (1).

KEKEWICH, J.:—

To my mind there really is no reasonable doubt on this point, though, as Mr. *Alexander* has pointed out, it would have been easy for the Legislature to have altered the law by express words. It did not see fit to do so, though it has introduced provisions to which I can only give effect by conceiving an implied intention to alter the law, and to give a class of creditors a claim which they had not before. I do not take Mr. *Alexander's* statement of the principle on which the cases he cited proceeded as perfectly accurate. The principle as stated by counsel, not precisely in his own language perhaps, is this, that the depositors belong to a class of persons who have had a hand in bringing into existence a paper company, or, if not strictly a paper company, a company which has not been competent to fulfil the undertaking of a public character which deserved and obtained the sanction of the Legislature. The depositors themselves taking nothing under the old Acts and the Board of Trade Rules, it follows that those who have joined hands with the depositors, or who are to be regarded as classed with the depositors in the birth of this paper company, or company which has from inanition died in infancy, are to be placed in the same category as the depositors themselves. Therefore the solicitors who promoted the bill, or other the promoters of the bill, using the word "promoters" in two senses, the parliamentary agents employed by the solicitors, or any one else who takes the pains to spend money and time in bringing the company before the Legislature, ought not to be paid out of the deposited funds, whereas, if there were such meritorious claimants—that is, persons who had claims outside and

(1) [1893] 1 Ch. 309.

independently of promotion, they ought to be paid. Subject to that, the deposit was forfeited to the Crown, whether by way of a fine or not is immaterial. It was forfeited to the Crown as a warning to promoters, whether depositors, parliamentary agents, or others, that they would get nothing out of such promotion as I have mentioned. That is the whole of the case in a short form as stated by Mr. *Alexander*.

Then the Legislature passed this Act of 1892, every word of which deserves particular attention, and leads up to the conclusion at which I have arrived. The Act is one, as the preamble states, "to authorize the release of certain deposits, and the cancellation of certain bonds, made or given to secure the performance of undertakings authorized by Parliament"; and therefore the Legislature had before it, in the first instance, not only the deposits which were to be released, but the exact character of the deposits. They are all "made or given to secure the performance of undertakings authorized by Parliament"—not necessarily to secure the bills being passed, but to give tangible and visible effect to the undertakings sanctioned by Parliament; and they are not to be forfeited or dealt with in any other way, but they can be released; and so, in the third sub-section of sect. 1, I find that, instead of the deposits being forfeited to the Crown, what is not wanted for the payment of creditors may (subject, of course, to the exercise of a discretion by the Court if a proper case requires it) be transferred to the depositors. It does seem somewhat strange that the depositors should say, "The Act was passed for our benefit. We who promoted this paper company, who in fact did more than any one else, because we found the cash, without which nothing could have been done at all, are to have our money back, but the solicitor and parliamentary agent who worked with us, and were as guilty as we were, are to be left out in the cold. The rule was formerly applied to lawyers and depositors, but now the lawyer is to be disregarded, and the depositors are to have all the cash." That does seem to me to be manifestly unfair. I observe that—partly, no doubt, as has been pointed out, because the Legislature did not wish to be burthened with abandoned bills, but partly also because the old form of conditions was

KEKEWICH, J.
1893
In re MANCHESTER, MIDDLETON, AND DISTRICT TRAMWAYS COMPANY.

insufficient—the Legislature has introduced the provision that, when the company is insolvent and an order to wind up is made, "or the undertaking has been abandoned" (the very event we have now to contemplate), the whole matter has to be considered, and this deposit has to be dealt with. No doubt the words authorizing the application of the fund "for the benefit of the creditors" are the same as before. The fund may still be applied "for the benefit of the creditors"; and those words were construed before, and no doubt would in similar cases be construed again, as applying to meritorious creditors, because there was an ultimate appropriation in favour of the Crown; but now, under this Act, the Crown not coming in, and having nothing whatsoever to say to the matter, and having no right to interfere in the least, and the ultimate relief being for the depositors, on that ground, quite apart from the question of participation in guilt, to my mind all the creditors are intended to take. It would, in my opinion, be a monstrous conclusion to say that the depositors are to be allowed to take this fund away and put it into their own pockets without satisfying all the creditors so far as the fund will go. The keynote is, no doubt, the introduction of the provision in favour of the depositors; but you may construe it in either of the ways which I have mentioned. The Act is recent, and there is only one case upon it, *In re Colchester Tramways Company* (1), and that one case has very little to do with the case before me, except that it was the case of an abandoned tramway, and that this Act was mentioned.

I am not deciding now—and I must be taken as leaving this open—the question whether, where there is a contest between meritorious and non-meritorious creditors, the non-meritorious will share rateably, or in any proportion at all, with the meritorious. I leave that open for discussion hereafter. What I do decide is that all creditors, meritorious and non-meritorious, come in before the depositors.

His Lordship having thus held that all creditors of the company, whether "meritorious or non-meritorious," were entitled to come in and assert their claims in priority to any claim by

(1) [1893] 1 Ch. 309.

the depositors, the several claims of the creditors above named now came on for argument.

Warmington, Q.C., and *C. E. E. Jenkins*, for Messrs. *Elmslie*, contended, on the facts, that they were entitled to look to the company for payment of their costs, and had therefore established their right to come in as creditors: *In re Skegness and St. Leonard's Tramways Company* (1), and the cases there cited.

Swinfen Eady, for Mrs. *Hanly*, relied on her husband's original retainer as parliamentary agent, and on the subsequent agreement, resolution, and judgment, as establishing her right to look to the company for payment.

Renshaw, Q.C., and *Chubb*, for the *Globe Industrial and General Trust Corporation*, relied on their judgment, which, being unimpeached by the company, must be taken to have established a valid claim: *Bowes* v. *Hope Life Insurance and Guarantee Company* (2). Even if they could not recover on their bond or judgment, they were entitled to claim as persons who had advanced the expenses of obtaining the Act of 1890.

Alexander, Q.C., and *J. G. Fawcus*, for Messrs. *Dimsdale*, relied on *In re Skegness and St. Leonard's Tramways Company*, as an authority that neither the solicitors nor the parliamentary agent had any claim to the fund; and they contended, upon the facts, that there had not been any meeting of directors capable of passing a resolution appointing *Hanly* parliamentary agent to the company: *In re Sanitary Carbon Company* (3). They also urged that they, representing the depositors, were entitled to hold the fund to meet any other possible claim. As to the effect of the judgments, the Court could inquire whether they could be supported or not: *Ex parte Kibble* (4). The *Lloyd's* bond on which the *Globe Corporation* had obtained their judgment was absolutely void: *Chambers* v. *Manchester and Milford Railway Company* (5).

(1) 41 Ch. D. 215.
(2) 11 H. L. C. 389.
(3) W. N. (1877) 223.
(4) Law Rep 10 Ch. 373.
(5) 5 B. & S. 588.

KEKEWICH, J.
1893
In re MANCHESTER, MIDDLETON, AND DISTRICT TRAMWAYS COMPANY.

Warmington, in reply, for Messrs. *Elmslie*, referred to *In re Brampton and Longtown Railway Company* (1).

Swinfen Eady, in reply, for Mrs. *Hanly*, distinguished the *Skegness Case* (2) on the ground that there *Hanly* looked for payment to *Spark*, the promoter, alone, whereas here he had the retainer of the company.

Renshaw, in reply, for the *Globe Corporation*, cited *In re Cork and Youghal Railway Company* (3) as establishing the validity of a *Lloyd's* bond, and referred to *Cunliffe, Brooks & Co.* v. *Blackburn and District Benefit Building Society* (4).

1893. March 29. KEKEWICH, J.:—

Having already decided that, as between the depositors and those hitherto styled non-meritorious creditors of the company, the latter are entitled to claim against the deposit which, by the Act of 1892, is directed to be applied "as part of the assets of the company for the benefit of the creditors thereof," I am now called upon to determine whether the claimants are creditors of the company. Some minor points require consideration; but the main question as regards each of these claimants is whether he is entitled to sue the company. The answer to that depends on the established relations between the claimants and the company. It is a question of law, dependent of course on the admitted or proved facts, but still a question of law only. Many cases bearing on it were cited in argument, and I have studied them all, but there is no occasion particularly to refer to any but that of *In re Skegness and St. Leonard's Tramways Company*, where all the earlier authorities came under review, and the law is fully discussed and expounded. On behalf of the claimants that case was said to establish that all a solicitor, parliamentary agent, or other person who has rendered services in connection with the company has to prove in order to maintain his claim as a creditor is, that he has no other paymaster to look to but the company. The phrase just used is

(1) Law Rep. 10 Ch. 177.
(2) 41 Ch. D. 215.
(3) Law Rep. 4 Ch. 748.
(4) 9 App. Cas. 857.

taken from the judgment of Lord Justice *Lindley* in the case cited, and similar or equivalent language is to be found in the judgments of the other Lords Justices, and also in that of Mr. Justice *Chitty*, from whom the appeal was brought. It must be granted, then, that this absence of any other paymaster is an essential condition to the maintenance of a claim against the company. It does not follow that this is the only essential condition of such claim, and, in my opinion, it is not the only one.

It may very well be that a solicitor or parliamentary agent has, intentionally or unintentionally, wisely or unwisely, omitted to take such precautions as will enable him to maintain an action for his costs against any other person, and yet he may not be a creditor of the company. That is, positive relations are required to be proved in the ordinary way to the satisfaction of the Court, and cannot depend only on the negation of the creditor and debtor relation as regards other persons. It is therefore necessary, in this or any other case, to inquire under what circumstances the claimant rendered the services in respect of which he claims, and whether these circumstances, which of course include all relevant documents, justify the conclusions, first, that he looked to the company for payment, and, secondly, that the company contracted an obligation to pay him. As regards services rendered in promoting the original Bill for the incorporation of the company, the first inquiry only is needed. The company, not being then in existence, could not directly or indirectly contract an obligation to pay; and, on the other hand, the equivalent of such a contract is upheld by the statute of incorporation, provided only the claimant can be said to have looked to the company for payment—by which I mean to the company and to no other paymaster. Persons who promote Bills in Parliament in the sense of being themselves petitioners for the Bill, or perhaps supporting the petition by contribution, actual or promised, to the costs incurred, may fairly be said, in the absence of any agreement or other indication to the contrary, to look to the company, that is, to the capital of the company, for reimbursement; and it might be assumed, in the absence of evidence of indemnity by others, that they had no other

KEKEWICH, J.
1893
In re MANCHESTER, MIDDLETON, AND DISTRICT TRAMWAYS COMPANY.

paymaster. They therefore would be entitled to rank as creditors of the company under the usual provision to which I have above referred. But is it reasonable to suppose that a solicitor or parliamentary agent promotes a Bill in this sense? To my mind nothing can be more unreasonable. It may be that solicitors and parliamentary agents are occasionally engaged in speculative business to a certain extent, that is, they undertake work which they hope and believe will be successful and remunerative, and they are content to run some risk of losing their costs should the event not fulfil their expectations; but it is not the business or the habit of solicitors or parliamentary agents to promote Bills. Their business is to act on instructions to work as the agents or attorneys for others who are their principals, and to look to those principals for payment. This is only expressing in my own language what is forcibly put by Lord Justice *Lindley* on page 240 of the *Skegness Case* (1). I am satisfied that the Lord Justice did not intend to exclude from the view there expounded a case such as I am now considering, viz., one where the solicitor and parliamentary agent say that they have no claim against the promoter, and that therefore they have one against the company. As the Lord Justice says, "The idea will not work." To my mind there is nothing here to shew that the solicitor and parliamentary agent had not a claim against the promoters, and everything points to an entirely different conclusion.

Mr. *Elmslie* says that his firm were solicitors "for the Bill," and the phrase is used to shew that he had no client, or at best an incorporeal one. It is obvious that they were really instructed by Messrs. *Robinson* and *Morrow*, the real promoters of the Bill. Of course they took their instructions from some one, and there was nobody else to give them. The bill of costs has been furnished to me, and if confirmation of this view were needed, the bill of costs largely confirms it. True, it is not made out to any particular person, and is stated to be "Messrs. *Elmslie, Forsyth, & Elmslie's* charges in reference to promoting and passing the *Manchester, Middleton and District Tramways Bill*"; but the first item of charge is for several attendances upon Mr. *Morrow* in reference to the proposed application to Parliament, and con-

(1) 41 Ch. D. 215.

ferring thereon, and advising, and every page of a somewhat lengthy document illustrates the accuracy of that item.

With whom did the solicitors confer? Whom did they advise? There is but one answer—Mr. *Morrow* and those who co-operated with him in the promotion of the company. Therefore, even if the solicitor has no other paymaster, into which I do not further inquire, he is not, in my opinion, a creditor of the company in respect of the costs incurred about the original Bill. And the parliamentary agent is in the like position. There is no occasion to reason his case out. He was no more a promoter of the Bill than the solicitor was. He acted throughout in a professional character only, received his instructions and fulfilled them as agent, and must look to his principal for payment. At my request his bill of costs also has been furnished, and a perusal of it equally confirms the view above expressed. Indeed, it is compiled on similar lines. It might be said that the promoters are creditors by virtue of the statute, and that to prevent circuity of action the solicitor and parliamentary agent might claim directly against the company. This is quite possible; but the solicitor and parliamentary agent have come here to say that they have no claim against the promoters—that they have looked to only one paymaster, namely, the company, and I must deal with the case on that footing. If they have thus defeated themselves the fault is their own.

This course of reasoning does not necessarily dispose of claims founded on services rendered subsequently to the incorporation of the company. It will be presently seen that in my view it does dispose of them also; but of course it does not do so necessarily, because one might find a liability of the company after incorporation and independently of statutory provision founded on retainers, agreements, or the like, rendering the company liable in its corporate character. Such things are, in fact, put forward both by the solicitor and parliamentary agent as supporting their claim to subsequent costs. But what are they worth? There are documents purporting to be sealed, and in fact sealed, with the common seal of the company. There are documents purporting to be signed on behalf of the company in pursuance of resolutions passed, and if the company could be regarded as

KEKEWICH, J.
1893
In re MANCHESTER, MIDDLETON, AND DISTRICT TRAMWAYS COMPANY.

having had any real existence for such purposes, it might not be right to go behind those documents, and they might be treated as authoritative, and binding the company even though there was some question touching their propriety. There were addressed to the Court, in opposition to this part of the claimants' case, arguments founded on the provisions of the general and special Acts by which this company is governed respecting the election of directors, the number required to constitute a board, and so forth. Far be it for me to say that these arguments, and the statutory provisions on which they rest, do not deserve attention; but, in my opinion, it is not necessary to go so far to find an answer to the claims. Let me say boldly and plainly that, for such purposes as are now under consideration, the corporation did not exist at all. This is, of course, somewhat paradoxical. The corporation was in fact constituted by the Act of 1885 as consisting of "*Richard Robinson, Joseph Cunard Morrow,* and all other persons and corporations who have already subscribed to or shall hereafter become proprietors in the undertaking," and it is paradoxical to say that the corporation, having been thus constituted, did not for some purposes exist at all. But it is a statutory corporation called into existence by a special Act of Parliament (in which certain general Acts are incorporated) for special purposes, and according to the special and general Acts there is required for the fulfilment of those purposes certain machinery which cannot be set in motion until the original corporation has been enlarged beyond the promoters, Messrs. *Robinson* and *Morrow.* The Legislature did not intend that those two gentlemen should by themselves exercise the powers vested in the corporation.

This, to my mind, is of the essence of all that vast body of legislation which is familiar to us through the railway companies, canal companies, and many other companies of a like character, in which the capital and industry of the country are so largely embarked.

Possibly no decision goes quite so far as this; but we are familiar with companies existing only for the purposes of liquidation and devoid of active powers; and the principle upon which I rely is recognised in the already cited case of *In re Skegness*

and St. Leonard's Tramways Company (1), and especially by the judgment of Lord Justice *Cotton*, who says (2): "It is true that in one sense it was called into existence by the Act of Parliament, but it never had any existence except upon paper and by Act of Parliament." Mr. *Warmington* says that Messrs. *Robinson* and *Morrow*, in passing resolutions, making agreements, sealing retainers, and so forth, did so, not as directors, but as proprietors; but the answer is that they had no rights as proprietors, that they had no powers other than those conferred by statute, and that the powers conferred by statute could not be exercised but on the lines and according to the terms which the statutes prescribe.

Two subsidiary arguments must be noticed. First, it is said that this reasoning fails because there must be a step or steps towards the extension of the corporation and the performance of its duties, which could only be taken by Messrs. *Robinson* and *Morrow*, inasmuch as, in the first instance, they alone were members of the corporation. This may be conceded. The early members of the company would be added to the list, consisting, first, of two only, by co-optation, and in the first instance Messrs. *Robinson* and *Morrow* would be the only co-optators; but, because some such powers were necessarily vested in them, it does not follow that they were intended to exercise the larger powers for which corporate action was required.

Then it is urged that in the last Act, that of 1890, there is a recital that the company have entered into a contract for the construction and completion of the tramways, and that this is a parliamentary recognition of the existence of a company having power to contract. It behoves me to speak carefully and in guarded language. I suppose that Parliament was satisfied that a contract had been entered into, and deemed it right that an opportunity should be given to the company to carry that contract into effect; but it would be pressing the recital too hard to make it say that the contract was one to be fulfilled by Messrs. *Robinson* and *Morrow*, or without the proper and effective constitution of the machinery required by statute to work the undertaking.

(1) 41 Ch. D. 215. (2) 41 Ch. D. 234.

KEKEWICH, J.
1893
In re MANCHESTER, MIDDLETON, AND DISTRICT TRAMWAYS COMPANY.

A separate argument deserves separate notice. Judgments have been obtained against the company for the sums alleged to be due. It is conceded that, notwithstanding these judgments, the amounts for which they were recovered are not conclusive, and bills of costs are still liable to taxation; but it is insisted that they are conclusive that some amount is due, and due in respect of the services comprised in those bills of costs.

Further, it is argued that if the judgments are not for all purposes conclusive they are so in these proceedings, and that they must be treated as binding on the company until set aside in an action for that purpose. I entertain no doubt that I am entitled to inquire in this matter whether these judgments can be supported or not. Mr. *Alexander* referred me to a case, *Ex parte Kibble* (1), where that view was upheld in bankruptcy; and I am sure that like cases might be found in administration proceedings in Chancery. It may well be that if in any given case there arose on a judgment a question of a difficulty depending on the study of documents and argument of intricate points of law, and, still more, if it depended on a conflict of evidence requiring oral examination, and possibly the verdict of a jury, the Court would decline in administration proceedings to disregard a judgment, and would give the parties an opportunity of contesting it by independent action. This was what occurred in *Bowes* v. *Hope Life Insurance and Guarantee Company* (2), where, be it observed, the petitioners had declined to go into evidence in support of their claim, and there were no materials enabling the Court to determine whether the judgment was impeachable or not. But here all the facts are before us. It is not pretended that anything worth attention can be added. The judgments were obtained under Order XIV., and no defence was offered by the company, which on these occasions, as on all others, was really only another name for Messrs. *Robinson* and *Morrow*. If what I have already held is sound, the judgments can be of no more avail to the claimants than retainers under seal, or agreements purporting to be entered into by the paper company.

What has been said applies directly to the claims of the solicitor

(1) Law Rep. 10 Ch. 373. (2) 11 H. L. C. 389.

and parliamentary agent, the clients of Mr. *Warmington*, and Mr. *Swinfen Eady*; but in truth it governs also the claims of Mr. *Renshaw's* clients, the *Globe Industrial and General Trust Corporation*. So far as this latter claim rests on a judgment there is nothing to add. It rests also on a bond intended to be in the form of what is generally styled a "*Lloyd's* bond," but really given for money advanced. I do not propose to examine the case of *Chambers* v. *Manchester and Milford Railway Company* (1), or any other cases bearing on statutory powers of borrowing. Haply they would suffice to shew that the *Globe Corporation* could not sue on the bond. My judgment, however, is founded on the more general principle that it was not competent to such a corporation, or rather to Messrs. *Robinson* and *Morrow* purporting to act on behalf of the corporation, either to borrow money or give a bond. This claim fails with the others and on like grounds. But it is said that although the *Globe Corporation* cannot recover on their judgment, or on their bond, they are entitled to stand in the place of those who really had the money advanced, and that it was expended in paying the costs of the Act of 1890, in which the usual provision for payment of the costs, charges, and expenses of and incident to applying for, obtaining, and passing the Act is found. Granted that they are subrogated to the rights of the persons to whom the money was paid, they cannot be in any better position than those persons, and my decision is that the latter could not themselves sue the company. This argument, therefore, also fails, and the result is that all three claims will be rejected.

It remains to deal with the costs. The contest here is entirely between the claimants and the depositors. The latter would have it thought that they appear in a representative character to defend the deposit for the sake of other claimants against it. There is some truth in this; but it is not the whole truth. They are fighting for their own hand. The Act of 1892 allows them to claim the deposit so far as it is not required to be applied as part of the assets of the company for the benefit of the creditors thereof. There is not a word to be said against bankers who in the ordinary course of business find money to satisfy the standing

(1) 5 B. & S. 588.

KEKEWICH, J.
1893
In re MANCHESTER, MIDDLETON, AND DISTRICT TRAMWAYS COMPANY.

orders of Parliament requiring deposits on the application for private Bills; but they must be taken to be aware, and those gentlemen were in fact aware, of the circumstances under which the money was required and found. Bankers providing money for such a purpose must know that they must incur some risk, and it is for them as a matter of business to make their own terms to cover that risk. Coming into this Court to protect and recover the deposit, they can scarcely be said to have meritorious claims whether against the solicitor, parliamentary agent, or other persons who have also incurred their own risk in the same matter. That they have incurred costs in resisting these claims may assist their application for what is ultimately left of the deposit after such debts, if any, as may be established against the company have been satisfied; but there, for the moment, the matter must rest.

The Order will simply be one for the refusal of all the summonses, and nothing will be said about costs of any party.

Solicitors: *Trinder & Capron; Wyatt & Barraud; J. W. Watkin; Spyer & Sons.*

G. I. F. C.

KEKEWICH, J.
1893
May 19.

FENNER *v.* WILSON.

[1893 F. 524.]

Practice—Patent Action—Threats of Legal Proceedings—Interim Injunction—Undertaking in Damages—Form of Order.

The undertaking in damages usually inserted in an order granting an interim injunction should not be inserted in an interim order in a patent action restraining one of the parties from publishing threats of legal proceedings for infringement of his alleged patent.

THIS was an action for alleged infringement of a patent. The Defendants having moved for an injunction to restrain the Plaintiff, until the trial of the action or further order, from continuing the publication of newspaper advertisements threatening legal proceedings or liability in respect of any manufacture, use, sale, or purchase of the patented articles, his Lordship, at the

hearing of the motion, made an order restraining the Plaintiff "until judgment in this action," from issuing the advertisements complained of.

In the minutes of order as given out by the Registrar, the order for injunction was prefaced by the words, "the Defendants, by their counsel, undertaking to abide by any order this Court may make as to damages, in case the Court shall be of opinion that the Plaintiffs shall have sustained any, by reason of this order, which the Defendants ought to pay." These words were inserted by the Registrar in accordance with what he considered to be the usual practice on all interim injunctions.

The Defendants now moved to vary the minutes by striking out the undertaking as to damages.

Warmington, Q.C., and *Wright Taylor*, for the Defendants:—

The injunction was granted to prevent the Plaintiff from advertising threats, the ground for the injunction being that stated by Mr. Justice *Kay* in *Goulard and Gibbs* v. *Sir Coutts Lindsay & Co.* (1). Your Lordship not having given any particular directions as to the form of the order, the Registrar thought fit to insert the undertaking complained of. We submit that was wrong. It is not a case for an undertaking, the order being final in its nature, that is, an order to restrain the publication of threats, on the ground, as your Lordship stated in granting the injunction, that they might "warp the even course of litigation." The case, therefore, does not fall within the principle laid down by Sir *G. Jessel* in *Smith* v. *Day* (2)—a case which was discussed by the Court of Appeal in *Griffith* v. *Blake* (3)—that an undertaking is intended for the protection of the Court and of the party enjoined in case it should turn out at the trial that the application for injunction was improper. This, then, being a final decision, and not one which will have to be reconsidered hereafter, the usual practice as to requiring an undertaking does not apply.

[KEKEWICH, J., referred to *Newby* v. *Harrison* (4).]

(1) 4 Rep. Pat. Cas. 189.
(2) 21 Ch. D. 421.
(3) 27 Ch. D. 474.
(4) 3 D. F. & J. 287.

KEKEWICH, J.

1893

FENNER v. WILSON.

J. C. Graham, for the Plaintiff:—

It may turn out at the trial that the Plaintiff was, after all, justified in publishing these threats, through the Defendants having no right whatever to infringe his patent. That, therefore, is a question which may have to be reconsidered hereafter, and accordingly the undertaking is, I submit, properly inserted.

KEKEWICH, J.:—

It would not be right for me to attempt to enlarge on Sir *George Jessel's* statement of the practice in *Smith* v. *Day* (1). It appears to me to be entirely correct. As he points out in his own language, the object in insisting upon an undertaking in damages is that if, by misadventure through the Judge not knowing all the facts, such as being misled by the evidence before him or by the arguments of counsel, an injunction is granted on an interlocutory application which ought not to have been granted, then the defendant is entitled to some remedy in damages; as, for example, where, in consequence of the injunction, the defendant has lost the proper season for building, or where it turns out, in a case of ancient lights, that the defendant has not in fact interfered with his neighbour's light at all. In all such cases it is right to protect the defendant against the damage he may suffer by the wrongful issue of an injunction, and therefore the Court exacts an undertaking in this form—which is the form adopted, *mutatis mutandis*, in the present instance—(*Seton* on Decrees (2)): "The plaintiff, by his counsel, undertaking to abide by any order this Court may make as to damages, in case this Court should hereafter be of opinion that the defendants shall have sustained any, by reason of this order, which the plaintiff ought to pay."

At some time or other, as, for instance, at the final stage of the litigation, you have to ascertain whether the defendant has, by reason of the injunction, sustained any damages, and then, further, whether those are damages which the defendant ought to pay. In that case the Court assesses them. But you arrive at that "hereafter," that is to say, when at the final stage of the case the Court is in a position to decide the question. That is

(1) 21 Ch. D. 421. (2) 5th Ed. vol. i. p. 452.

strictly applicable to the motion which I have here—a motion made between the issue of the writ and the hearing. But, though the injunction is interlocutory in that sense, it may not be interlocutory in another sense—that is to say, it may not be an order which has hereafter to be considered: it may not be an order leaving anything for the Court to consider at a future time. The only question here can be whether the matter is finally concluded, or whether there is a "hereafter" within the undertaking. Mr. *Graham* says, "Yes, because the Court is restraining threats—and if the Court is restraining threats, it is because it is desirable that these threats should not continue during the litigation, though they might be justified in the end when the trial is reached." That was certainly not so intended by me. I have the shorthand notes of my judgment before me, and I think that what Mr. *Warmington* has read expresses exactly the view I took of the case. I referred to Mr. Justice *Kay's dictum* in *Goulard and Gibbs' Case* (1), and said that "litigation must be allowed to proceed undisturbed by any advertisements or any conduct of the parties. They must play the game according to the rules of the game, and there must be no outside remarks which can in any possible event warp the even course of litigation."

The ground I went on was, that though it might not do much harm, yet a litigant has no right to say, "Not only have I instituted proceedings, but I am right, and everyone else proceeding on a similar footing is wrong." That is interfering with the even course of litigation. This order is appealable of course, but it is a final order: there is no "hereafter" in it. My decision, though subject to appeal, is not open to review at any time by me. Therefore it is impossible to say it is not a final order. Accordingly, the ordinary form of interlocutory injunction is not applicable, and there ought to be no undertaking here.

The minutes of the order, as given out by the Registrar, must therefore be varied by striking out the undertaking as to damages.

Solicitors: *Rooke & Sons*, agents for *Raley & Son, Barnsley; W. J. & E. H. Tremellen*, agents for *A. M. Blair, Manchester.*

(1) 4 Rep. Pat. Cas. 189. G. I. F. C.

VAUGHAN WILLIAMS, J.

1893
March 17, 18; April 26.

In re MINING SHARES INVESTMENT COMPANY.

[0064 of 1893.]

Company—Alteration of Memorandum of Association—Sanction of Court—Meaning of "Court"—Jurisdiction—Companies (Memorandum of Association) Act, 1890 (53 & 54 *Vict. c.* 62), *s.* 1—*Companies (Winding-up) Act,* 1890 (53 & 54 *Vict. c.* 63), *ss.* 1, 2, 32 *sub-s.* 2, 33—*Order of March* 26, 1892.

Vaughan Williams, J., as the Judge of the High Court to whom winding-up jurisdiction is assigned by the Order of the 26th of March, 1892, has jurisdiction to confirm alterations in memoranda of association under the *Companies (Memorandum of Association) Act*, 1890.

THE *Mining Shares Investment Company, Limited*, was registered under the *Companies Act*, 1862, on the 28th of July, 1864, with a capital of £250,000 in £10 shares; but in 1884 the capital was reduced to £102,340, in shares of £3 10*s.* each, of which more than £10,000 was paid up or credited as paid up.

On the 13th of March, 1893, a petition intituled "In the High Court of Justice, Chancery Division, Mr. Justice *Vaughan Williams*—In the matter of the *Mining Shares Investment Company, Limited*, and in the matter of the *Companies (Memorandum of Association) Act*, 1890," was presented to the High Court of Justice by the company. The petition asked that a special resolution, passed by the company on the 8th of September, 1892, and the 6th of October, 1892, that the memorandum of association might be altered by striking out certain words, might be confirmed by the Court pursuant to the *Companies (Memorandum of Association) Act*, 1890.

The petition was lodged at the office of the Registrar (Companies Winding-up), where a question was raised whether Mr. Justice *Vaughan Williams* had any jurisdiction to entertain the petition.

An *ex parte* summons was then taken out by the Petitioners, asking that directions might be given as to the petition, and this summons was adjourned into Court and heard by Mr. Justice *Vaughan Williams* on the 17th of March, 1893.

F. T. Procter, for the Petitioners:—

This is the first petition under the *Companies (Memorandum of Association) Act*, 1890, which has come before the Judge to whom winding-up jurisdiction was assigned by the Order of the 26th of March, 1892, and doubts have been raised as to what Judge can now make orders under this Act.

[VAUGHAN WILLIAMS, J.:—The first question is whether I have any jurisdiction at all. If I have jurisdiction, is it sole, or concurrent with that of other Judges?]

There seems to be little doubt that there is jurisdiction in this branch of the Court. Sect. 1 of the Act provides that a company may by resolution alter its memorandum of association in certain respects, but that in no case shall any such alteration take effect until confirmed on petition by "the Court which has jurisdiction to make an order for winding up the company." This Act received the Royal assent, and came into force on the 18th of August, 1890. No doubt, on that day the Court which had jurisdiction to wind up the company was the High Court of Justice, sect. 81 of the *Companies Act*, 1862, having provided that "the expression 'the Court,' as used in this part of this Act"—that is to say, Part IV., which relates to "Winding-up of companies and associations under this Act"—should mean, in the case of a company like this, "the High Court of Chancery." There is no doubt, therefore, that a petition for confirmation of a resolution for altering a memorandum of association presented between the 18th of August, 1890, and the 1st of January, 1891, would be properly heard by any one of the Judges of the Chancery Division. But on the 18th of August, 1890, another statute, the *Companies (Winding-up) Act*, 1890, received the Royal assent. By sect. 34 the operation of this Act was postponed till the 1st of January, 1891. Sect. 33 repealed sect. 81 of the Act of 1862, and sect. 32, sub-sect. 2, is in these words: "In Part IV. of the *Companies Act*, 1862, and in this Act, the expression 'the Court,' when used in relation to a company shall, unless the contrary intention appears, mean the Court having jurisdiction under this Act to wind up the company." Sect. 1 provided (sub-sect. 1) that "the Courts having jurisdiction to wind up companies in

VAUGHAN WILLIAMS, J.

1893

In re MINING SHARES INVESTMENT COMPANY.

England and *Wales* shall be the High Court" and some other Courts named, and (sub-sect. 2) that "where the amount of the capital of a company paid up or credited as paid up exceeds ten thousand pounds"—as in this case—"a petition to wind up the company . . . shall be presented to the High Court;" or in certain circumstances, not present in this case, either to the High Court or a Palatine Court. Therefore, as from the 1st of January, 1891, the jurisdiction under the *Companies* (*Memorandum of Association*) *Act*, 1890, was vested in the High Court of Justice. But sect. 2 of the *Companies* (*Winding-up*) *Act*, 1890, says who shall exercise that jurisdiction. It enacts that, subject to general rules and orders of transfer, "the jurisdiction of the High Court under this Act shall, as the Lord Chancellor may from time to time by general order direct, be exercised, either generally or in specified classes of cases, either by such Judge or Judges of the Chancery Division of the High Court as the Lord Chancellor may assign to exercise that jurisdiction, or by the Judge who, for the time being, exercises the bankruptcy jurisdiction of the High Court." Lord *Halsbury*, L.C., by an order dated the 29th of November, 1890, exercised the power given to him by sect. 2 by ordering as follows: "That on and after the 1st day of January, 1891, the jurisdiction of the High Court, under the *Companies* (*Winding-up*) *Act*, 1890, shall until further order be exercised by the Judges of the Chancery Division to whom for the time being Chambers are attached; and such Judges shall on and after the day aforesaid, and until further order, be the Judges of the High Court assigned for the purpose of that jurisdiction, pursuant to the *Companies* (*Winding-up*) *Act*, 1890." But on the 26th of March, 1892, Lord *Halsbury*, L.C., again exercised the power vested in him by sect. 2, and by an order reciting that Mr. Justice *Vaughan Williams*, "being the Judge of the High Court who for the time being exercises the bankruptcy jurisdiction of the High Court," had consented, with the concurrence of the Lord Chief Justice, "to sit and act as an additional Judge of the Chancery Division of the High Court, for the purpose of hearing the causes and matters assigned to him by the Lord Chancellor, or any applications therein," the Lord Chancellor, by virtue of sect. 2 of the *Companies* (*Winding-up*)

Act, sect. 5 of the *Judicature Act*, 1884, and of all other powers enabling him in that behalf, ordered as follows: "That on and after the 6th day of May, 1892, the jurisdiction of the High Court under the *Companies* (*Winding-up*) *Act*, 1890, shall until further order be exercised by the Honourable Mr. Justice *Vaughan Williams*, sitting and acting for the purpose of the exercise of such jurisdiction as an additional Judge of the Chancery Division, and the said Judge shall, on and after the day aforesaid, and until further order, be the Judge of the High Court assigned for the purpose of the exercise of that jurisdiction, pursuant to the *Companies* (*Winding-up*) *Act*, 1890."

Looking again at sect. 1 of the *Companies* (*Memorandum of Association*) *Act*, 1890, it is plain that the tribunal which can wind up the company can sanction an alteration in its memorandum of association. To hold that the words, "the Court which has jurisdiction" to wind up, mean only the Court which on the 18th of August, 1890, had such jurisdiction, would be a very narrow construction. The jurisdiction to sanction alterations is in the Court which possesses jurisdiction to wind up, and when, in pursuance of a statutory power, the Lord Chancellor has said that a certain judge shall exercise that winding-up jurisdiction, the power to sanction alterations goes to him by force of the words of sect. 1 of the *Companies* (*Memorandum of Association*) *Act*, 1890.

It has never been decided that the jurisdiction to sanction alterations could not be exercised by the new winding-up judge; but on a petition for confirmation of a resolution for reduction of capital coming before him, Mr. Justice *Chitty* held that the jurisdiction to confirm such resolutions was vested in the Chancery Division at the time when the *Companies* (*Winding-up*) *Act*, 1890, was passed, and had not been taken away or altered by that Act or by the Order of the 26th of March, 1892; and his Lordship said that "a similar reasoning might be applied to applications under the *Companies* (*Memorandum of Association*) *Act*, 1890," and "that he had consulted Mr. Justice *North*, Mr. Justice *Stirling*, and Mr. Justice *Kekewich* on this matter, and was authorized by them to say that they concurred in the

VAUGHAN WILLIAMS, J.

1893

In re MINING SHARES INVESTMENT COMPANY.

judgment he had just given": *In re Islington and General Electric Supply* (1).

The petition before Mr. Justice *Chitty* was not presented under the *Companies (Memorandum of Association) Act*, 1890; but many orders under that Act have since been made by Judges of the Chancery Division.

1893. March 18. VAUGHAN WILLIAMS, J.:—

This is a petition under the *Companies (Memorandum of Association) Act*, 1890. On a summons at Chambers for directions, the question has been raised whether I have jurisdiction to deal with petitions under this Act. I have arrived at the conclusion that I have jurisdiction, and I do not intend to decide anything more than that. I do not propose to say whether, in my judgment, the jurisdiction which I possess is exclusive, or whether it is a jurisdiction which I possess concurrently with other Judges of the Chancery Division; and I do not propose to discuss the question in such a way that I shall have to express an opinion that the jurisdiction is a concurrent one. All that was decided by Mr. Justice *Chitty* in *In re Islington and General Electric Supply* was that he himself had jurisdiction under the Act as a Judge of the Chancery Division. He did not decide—the question was not before him—that I had not jurisdiction. If he had come to such a decision, and the question had been before him for determination, I might have been bound to follow his decision; but the question was not before him. In my judgment, I have jurisdiction, and I propose to state shortly the grounds of my decision. By sect. 81 of the *Companies Act*, 1862, it is provided that, "the expression 'the Court,' as used in this part of this Act"—that is, Part IV., the part which deals with "Winding up of companies and associations under this Act"—"shall mean the following authorities (that is to say)"—except in local cases—"in the case of a company registered in *England* . . . . the High Court of Chancery." That jurisdiction was, by the *Judicature Act*, transferred to the High Court of Justice. Sect. 81 of the Act of 1862 was repealed by sect. 33 of the *Companies (Winding-up) Act*, 1890, and I may observe that

(1) W. N. (1892) 81.

that Act was passed on the 18th of August, 1890, the very day on which the *Companies (Memorandum of Association) Act*, 1890, was passed. Sect. 1, sub-sect. 1, of the *Winding-up Act* provides that "The Courts having jurisdiction to wind up companies in *England* and *Wales* shall be the High Court," and certain other Courts, and sub-sect. 2 provides that in the case of a company like this, having a capital of over £10,000, the petition shall be to the High Court. By sect. 2, "subject to general rules and to orders of transfer made under the authority of the *Supreme Court of Judicature Act*, 1873, and the Acts amending it, the jurisdiction of the High Court under this Act shall, as the Lord Chancellor may from time to time by general order direct, be exercised, either generally or in specified classes of cases, either by such Judge or Judges of the Chancery Division of the High Court as the Lord Chancellor may assign to exercise that jurisdiction, or by the Judge who for the time being, exercises the bankruptcy jurisdiction of the High Court." Therefore the winding-up jurisdiction is to be exercised by the Judges mentioned in the section. By an order of the Lord Chancellor and the Lord Chief Justice, made on the 26th of March, 1892, it was directed that on and after the 6th day of May, 1892, "the jurisdiction of the High Court under the *Companies (Winding-up) Act*, 1890, shall until further order be exercised by" me, "sitting and acting for the purpose of the exercise of such jurisdiction as an additional Judge of the Chancery Division," and I am the Judge of the High Court by such order "assigned for the purpose of the exercise of that jurisdiction, pursuant to the *Companies (Winding-up) Act*, 1890." Under the circumstances, it seems to me to be perfectly clear that I am a Judge having assigned to me the jurisdiction of the High Court in the winding-up of companies. That being so, sect. 1 of the *Companies (Memorandum of Association) Act*, 1890, provides that an alteration in a memorandum shall not take effect "until confirmed on petition by the Court which has jurisdiction to make an order for winding up the company." I am of opinion that I am the Court having jurisdiction to make such an order, in the sense that the High Court has such jurisdiction, and that I am the Judge to whom that part of the jurisdiction has been assigned. I believe it has been suggested that "has"

VAUGHAN WILLIAMS, J.

1893

In re MINING SHARES INVESTMENT COMPANY.

does not mean has at the time of the presentation of the petition, but has at the time when the Act of Parliament was passed. I do not agree with that. In any case, it would be a forced and non-natural construction; but it is emphatically so where the word is used in an Act passed on the very day on which another Act was passed repealing sect. 81 of 1862, and pointing out what Court should thereafter exercise jurisdiction in winding-up. I am of opinion that I have jurisdiction, and I shall refer the petition to Chambers to be dealt with in the ordinary way.

1893. April 26. His Lordship made the order asked for by the petition.

Solicitor for the Petitioners: *H. P. Cobb.*

F. E.

VAUGHAN WILLIAMS, J.

1893 *May* 17.

In re OCEAN QUEEN STEAMSHIP COMPANY.

[00127 of 1893.]

Company—Reduction of Capital—Confirmation by the Court—Meaning of "Court"—Companies Act, 1867 (30 *&* 31 *Vict. c.* 131), *ss.* 9, 11, 12—*Companies (Winding-up) Act,* 1890 (53 *&* 54 *Vict. c.* 63), *ss.* 1, 2, 32 *sub-s.* 2, 33—*Order of March* 26, 1892.

Vaughan Williams, J., as the Judge of the High Court of Justice to whom winding-up jurisdiction is assigned by the Order of the 26th of March, 1892, has jurisdiction to confirm a reduction of the capital of a company where the amount of such capital, paid up or credited as paid up, exceeds £10,000.

THE *Ocean Queen Steamship Company, Limited,* was incorporated in the year 1887 under the *Companies Acts,* 1862 to 1886, as a company limited by shares, and at the date of the passing of the resolution mentioned below the capital of the company consisted of £25,000, in shares of £25 each, of which £10,600 had been paid up in cash.

By a resolution passed at an extraordinary general meeting of the company held on the 23rd of February, 1893, and confirmed as a special resolution at an extraordinary general meeting held on the 13th of March, 1893, it was resolved that the capital of

the company should be reduced from £25,000, divided as above mentioned, to £8000, divided into 1000 shares of £8 each, and that such reduction should be effected by cancelling capital which had been lost or was unrepresented by available assets to the extent of £17 per share upon each of the 424 shares which had been issued and were then outstanding, and by reducing the nominal amount of all the shares in the company's capital from £25 to £8.

On the 3rd of May, 1893, the company presented a petition, addressed to the High Court of Justice, and intituled "In the High Court of Justice, Chancery Division, Mr. Justice *Vaughan Williams*. In the matter of the *Companies Act*, 1867, and in the matter of the *Companies Act*, 1877. And in the matter of the *Ocean Queen Steamship Company, Limited and Reduced*," praying that the special resolution and the reduction to be effected thereby might be confirmed, and that the addition of the words "and reduced" to the company's name might be dispensed with altogether.

The petition came on for hearing before Mr. Justice *Vaughan Williams* on the 17th of May, 1893.

B. B. Swan, for the Petitioners.

VAUGHAN WILLIAMS, J.:—

I have already considered the question of jurisdiction in the recent case of *In re Mining Shares Investment Company* (1), and have satisfied myself that I have jurisdiction to make the order. The company must, however, use the words "and reduced" as part of its name for one calendar month, and the usual advertisements must be issued.

Solicitor for Petitioners: *Charles E. Harvey.*

(1) *Ante*, p. 660.

F. E.

END OF VOL. II.

The Mode of Citation of the Volumes in the LAW REPORTS, commencing January 2, 1893, will be as follows:—

In the First Series,

[1893] 1 Ch. [1893] 2 Ch. [1893] 3 Ch.

In the Second Series,

[1893] 1 Q. B. [1893] 2 Q. B. [1893] P.

In the Third Series,

[1893] A. C.

INDEX.

ABANDONMENT—Tramway company - 638
See TRAMWAY COMPANY.

ACTION—Quia timet—Injunction - - 87
See NUISANCE. 3.

AGENT—Parliamentary—Abandoned undertaking—Application of deposit - 638
See TRAMWAY COMPANY.

ANNUITY—*Charge on Corpus—Settled Estate—Raising Arrears by Sale or Mortgage of Estate.*] When an annuity charged upon the corpus of settled real estate is in arrear the Court has power to order the arrears to be raised by sale or mortgage of the estate, though the making of such an order is a matter, not of course, but of discretion.—*Graves* v. *Hicks* (11 Sim. 551), and *Taylor* v. *Taylor* (Law Rep. 17 Eq. 324) considered. *In re* TUCKER. TUCKER *v.* TUCKER 323

APPEAL—Interpleader—Common Law Procedure Act - - - - - 280
See PRACTICE. 1.

APPORTIONMENT—Mortgage of two properties—Redemption - - - 54
See MORTGAGE. 2.

ARBITRATION—*Practice—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4—"*Step in the Proceedings*"—*Rules of Supreme Court*, 1883, *Order* LXIV., *r.* 8—*Enlargement of Time by Consent.*] An application by letter, under Order LXIV., rule 8, for extension of time to put in a statement of defence, is not taking a step in the proceedings within the meaning of sect. 4 of the Arbitration Act, 1889. BRIGHTON MARINE PALACE AND PIER, LIMITED *v.* WOODHOUSE - - - 486

ARTICLES OF ASSOCIATION—Unlimited company—Power to members to withdraw
See COMPANY. 6. [242

ATTACHMENT—Debtors Act—Defaulting trustee bankrupt - - - 1
See BANKRUPTCY.

BANKER—*Loan to Broker—Deposit of Customer's Securities by Broker—Authority of Broker to Pledge—Bonâ fide Holder for Value—Notice—Estoppel—Stock Exchange—"Contango" Transactions.*] Stockbrokers were employed by a client to make for him from time to time on the London Stock Exchange speculative purchases and sales of stock, shares, and bonds. The brokers furnished him with money to enable him to pay for the purchases, and he authorized them to hold the purchased stocks, shares, and bonds as security for their advances, and also to repledge them.—The brokers had a loan account with their bankers, with whom they deposited stock, shares, and bonds belonging to various clients en bloc, as security for the bankers' advances. The bank allowed the brokers to withdraw the deposited securities from time to time, as they required them, upon their depositing others of equal value. Ultimately, the brokers became defaulters on the Stock Exchange, and were adjudicated bankrupts. At the date of the default there were in the hands of the bank various stocks and shares, and also some bonds payable to bearer, which the brokers had purchased for the client. The stocks and shares were transferable by deed in the ordinary way, and they had all been transferred to, and were registered in, the names of trustees for the bank. Some of the transfers were made by the client himself, some by the brokers, and some by third parties. Those which were made by the client were expressed to be for a nominal consideration; the others were expressed to be for full value. The bonds passed by delivery on the Stock Exchange, and were always there treated as negotiable.—The client claimed to be entitled to redeem the securities on paying to the bank the amount which was due from himself to the brokers; the bank claimed to hold the securities until payment of a larger amount which was due to them from the brokers. The client asserted that the authority which he had given to the brokers to repledge his securities authorized them to do so only for an amount not exceeding what was due from himself to them.—There was evidence that the majority of transactions on the Stock Exchange, when the purchaser of securities does not pay for them at once, is carried on upon a system known as "contango," or "continuation,"

BANKER—*continued.*

under which the person who provides the purchase-money becomes the owner of the purchased stock or shares, he entering into a contemporaneous contract with the purchaser to sell to him at a future day (generally the next "account day" on the Stock Exchange) an equal amount of similar stock or shares at the original price, increased by a charge called the "contango":—*Held*, upon the evidence, especially having regard to that relating to the "contango" system, that there was nothing to lead the bank to suppose that the stocks and shares which were transferred to their trustees were not the brokers' own property; and that the bank must therefore be treated as bonâ fide holders for value without notice, and their legal title could not be impeached; and that, consequently, the client could not redeem without paying the amount which was due from the brokers to the bank:—*Held*, also, that as to the stocks and shares of which the client had himself executed transfers, he was estopped from denying that the brokers had authority to pledge them to the bank for their full value:—*Held*, also, that the bonds were negotiable securities, and that as to them the case was governed by *London Joint Stock Bank* v. *Simmons* ([1892] A. C. 201), and that the client could not redeem without paying the amount due from the brokers to the bank.—It being admitted that the amount due to the bank exceeded the value of the client's securities, an account was not asked for. BENTINCK *v.* LONDON JOINT STOCK BANK - - - - - 120

BANKRUPTCY—*Attachment—Committal—Jurisdiction—Discretion—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4—*Debtors Act*, 1878 (41 & 42 *Vict. c.* 54)—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 9.] The remedy against the property or person of a debtor prohibited by sect. 9 of the Bankruptcy Act, 1883, is in respect of a debt, and intended to enforce payment of that debt, but the remedy by committal or attachment under the Debtors Act, 1869, is punishment for an offence. Therefore the prohibition contained in the Act of 1883 does not take away the jurisdiction of the Court to order, under sect. 4, sub-sect. 3, of the Act of 1869, the committal or attachment of a defaulting trustee against whom a receiving order in bankruptcy has been made. —*Cobham* v. *Dalton* (Law Rep. 10 Ch. 655, 657) dissented from. *In re* SMITH. HANDS *v.* ANDREWS - - - - - - C. A. 1

—— Debt provable—Liability of co-surety 514
See PRINCIPAL AND SURETY.

BILL OF COSTS—Taxation—Costs - 284
See SOLICITOR.

BILL OF EXCHANGE—*Drawn abroad—Accepted payable in London—Liquidation of Acceptors—Protest for Non-Payment — Protest for better Security—Commission—Notarial Expenses—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 51, *sub-ss.* 2, 5; *s.* 57, *sub-s.* 1 (*c*); *ss.* 65–68, *s.* 97.] A bank at Rio de Janeiro drew bills of exchange on a bank in London, and they were duly accepted by such bank.—The London bank went into liquidation before the bills matured, and, after the stoppage of the bank, the holders had them protected for better security, and they were accepted supra protest for the honour of the drawers by the drawers' London bankers.—The bills were duly presented for payment to the acceptors and were protested by the holders for non-payment. They were then presented to the bankers of the drawers, who paid the principal money due on the bills together with the notarial charges thereon, which consisted partly of the expenses of protest for non-payment and partly of the expenses of protest for better security. The bankers of the drawers also charged the drawers a commission for accepting the bills.—The drawers were admitted to prove in the winding-up of the London bank for the amount of the bills, and they claimed to prove also in respect of the notarial charges and commission. This claim the liquidator rejected:—*Held*, upon summons for leave to prove in respect of the latter claims that the applicants were entitled to prove for the expenses of protest for non-payment, as being expenses falling within sect. 51, sub-sect. 2, and sect. 57, sub-sect. 1, of the Bills of Exchange Act, 1882, but that they were not entitled to prove in respect of the expenses of protest for better security nor for the commission, as under sect. 57 such expenses only as are "necessary" are recoverable.—"The protest" mentioned in sect. 68, sub-sect. 6, means the protest for non-payment which is necessary.—The Act not only does not give but excludes the expenses of the protest for better security. *In re* ENGLISH BANK OF THE RIVER PLATE. *Ex parte* BANK OF BRAZIL - - - - 438

BILL OF EXCHANGE—*continued.*

BLANKS IN WILL—Charitable intent - 41
See CHARITY. 1.

BROKER—Deposit of customer's securities with banker - - - - 120
See BANKER.

BUILDING SOCIETY—*Member—Notice of Withdrawal—Alteration in Rules after Notice and before Payment.*] The Plaintiff was the holder of four fully paid-up shares in a building society. By one of the rules of the society a member on giving one month's notice in writing might withdraw his shares. The rules also provided that they might be altered by a majority of three-fourths of the members.—The Plaintiff gave the requisite notice of withdrawal; but after such notice and before he was repaid the above rule was altered by giving the directors power to pay off in priority members holding less than £50 in the society:—*Held*, that although the Plaintiff had at the date of his notice of withdrawal under the rule then in force a vested right to be paid the amount due on his shares, he being still a member of the society, was liable to have this right divested by a subsequent alteration in the rule duly made, and that he was therefore bound by the altered rule. PEPE *v.* CITY AND SUBURBAN PERMANENT BUILDING SOCIETY - 311

CAPITAL—Reduction of—Sanction of Court—Jurisdiction - - - 666
See COMPANY. 2.

CASES—*Baines* v. *Baker* (Amb. 158) considered
See NUISANCE. 3. [87
—— *Baring* v. *Abingdon* ([1892] 2 Ch. 374, 381) dictum explained - - - 75
See LANDLORD AND TENANT. 2.
—— *Barkshire* v. *Grubb* (18 Ch. D. 616) explained - - - - 315
See VENDOR AND PURCHASER.
—— *Barnes* v. *Racster* (1 Y. & C. C. 401) followed - - - - 54
See MORTGAGE. 2.
—— *Bayley* v. *Great Western Railway Company* (26 Ch. D. 434, 457) dictum explained
See VENDOR AND PURCHASER. [315
—— *Belcher* v. *Williams* (45 Ch. D. 510) not followed - - - - 221
See PARTITION ACTION.
—— *Birks* v. *Trippet* (1 Wms. Saund. 32) followed - - - - 300
See LIMITATIONS, STATUTE OF. 4.
—— *Christ's Hospital* v. *Grainger* (1 Mac. & G. 460) distinguished - - 491
See CHARITY. 2.
—— *Cobham* v. *Dalton* (Law Rep. 10 Ch. 655, 657) dissented from - - 1
See BANKRUPTCY.
—— *Coleman* v. *Llewellin* (34 Ch. D. 143) distinguished - - - 151
See MORTGAGE. 1.
—— *Corporation of the Sons of the Clergy* v. *Sutton* (27 Beav. 651) followed - - 618
See CHARITY. 3.
—— *Davison* v. *Gent* (1 H. & N. 744) followed
See LANDLORD AND TENANT. 2. [75
—— *Fletcher* v. *Rylands* (Law Rep. 1 Ex. 265; 3 H. L. 330) followed - - 186
See NUISANCE. 1.
—— *Forsyth* v. *Bristowe* (8 Exch. 716) followed
See LIMITATIONS, STATUTE OF. 3. [429
—— *Gillard* v. *Cheshire Lines Committee* (32 W. R. 943) distinguished - - 75
See LANDLORD AND TENANT. 2.
—— *Graves* v. *Hicks* (11 Sim. 551) considered
See ANNUITY. [323
—— *Hancock* v. *Hancock* (38 Ch. D. 78) followed
See HUSBAND AND WIFE. 1 [307
—— *Lawrance* v. *Lord Norreys* (15 App. Cas. 210) followed - - - 545
See LIMITATIONS, STATUTE OF. 1.
—— *London Joint Stock Bank* v. *Simmons* ([1892] A. C. 201) followed - - 120
See BANKER.
—— *Lyon* v. *Reed* (13 M. & W. 285) considered
See LANDLORD AND TENANT. 2. [75
—— *North London Land Company* v. *Jacques* (32 W. R. 283) disapproved - 271
See LANDLORD AND TENANT. 1.
—— *Palmer, In re* (45 Ch. D. 491) considered
See SOLICITOR. [284
—— *Roddam* v. *Morley* (1 De G. & J. 1) followed
See LIMITATIONS, STATUTE OF. 3. [429
—— *Taylor* v. *Taylor* (Law Rep. 17 Eq. 324) considered - - - - 323
See ANNUITY.

CASES—*continued.*
—— *Teasdale* v. *Sanderson* (33 Beav. 534) explained - - - - 461
See TENANT IN COMMON.
—— *Thomas* v. *Cook* (2 B. & Ald. 119) considered - - - - 75
See LANDLORD AND TENANT. 2
—— *Thompson* v. *Montgomery* (41 Ch. D. 35; [1892] A. C. 217) distinguished - 567
See TRADE-MARK. 3.
—— *Trevor* v. *Whitworth* (12 App. Cas. 409) distinguished - - - - 242
See COMPANY. 6.
—— *Trustees, Executors, and Agency Company* v. *Short* (13 App. Cas. 793) distinguished
See LIMITATIONS, STATUTE OF. 1. [545
—— *Tyler, In re* ([1891] 3 Ch. 252) distinguished
See CHARITY. 2. [491
—— *Wood's Trade-mark, In re* (32 Ch. D. 262) distinguished - - - 262
See TRADE-MARK. 2.

CHAPEL—Wesleyan—"Endowment"—Building registered as place of religious worship—Jurisdiction of Charity Commissioners
See CHARITY. 3. [618

CHARITY—*Gift by Will—General Charitable Intent—"Religious Societies"—Blanks in Will.*] A bequest to a religious institution or for a religious purpose, is primâ facie a bequest for a "charitable" purpose; and the law applicable to "charitable" bequests, as distinguished from the law applicable to ordinary bequests, ought to be applied to a bequest to a religious institution, or for a religious purpose.—A testator gave his property "to the following religious societies, viz.* to be divided in equal shares among them," the particular objects not being named:—*Held* (reversing Kekewich, J.), that the testator's personal estate was subject to a trust for "charitable" purposes; and a scheme was directed as to such part of it as was pure personalty at the testator's death. *In re* WHITE. WHITE *v.* WHITE [C. A. 41

2. —— *Gift in Perpetuity—Remoteness—Gift over to individuals.*] The principle established by *Christ's Hospital* v. *Grainger* (1 Mac. & G. 460), and *In re Tyler* ([1891] 3 Ch. 252), that the rule against perpetuities has no application to the transfer in a certain event of property from one charity to another does not extend to cases where (1.) an immediate gift in favour of private individuals is followed by an executory gift in favour of charity, or (2.) an immediate gift in favour of charity is followed by an executory gift in favour of private individuals.—The testator, who died in 1847, by his will, dated in 1846, bequeathed two sums of money to trustees upon trust to establish schools in certain parishes, and to continue the same for ever thereafter; and he declared that, if at any time thereafter, the Government should establish a general system of education, the several trusts of the said legacies should cease and determine, and he bequeathed the said sums of money in the same manner as he had bequeathed the residue of his personal estate; and he appointed his three sisters to be his executrixes and residuary legatees:—*Held*,

CHARITY—*continued.*

that the testator had made an immediate disposition in favour of charity in perpetuity, followed by a gift over of a future interest, to arise upon an event which need not necessarily occur within perpetuity limits; and that the gift over consequently failed. *In re* BOWEN. LLOYD PHILLIPS *v.* DAVIS - - - - - 491

3. —— *Wesleyan Chapel—Building Registered as a Place of Meeting for Religious Worship—"Endowment"—Voluntary Subscriptions—Jurisdiction of Charity Commissioners to require Accounts from Trustees of Chapel—Exemption—Charitable Trusts Act,* 1853 (16 & 17 *Vict. c.* 137), *ss.* 62, 66.] In 1811 land was conveyed to trustees upon trust to erect thereon a Wesleyan chapel, and to collect money by pew-rents, contributions, or otherwise, and to stand possessed of the same, and also all rents, issues, and profits of the chapel and other erections which should be built on the land, upon trust to pay thereout the principal and interest of money borrowed in respect of the trust premises, and to apply the surplus for the support of the preachers for the time being stationed in the circuit of the chapel; and upon further trust, if necessary, to sell the property and apply the proceeds of sale in the purchase or erection of another more convenient chapel, and hold the same upon the like trusts. On the site so conveyed a chapel was erected, and used, and registered as a place of religious worship. Subsequently, adjoining pieces of land were purchased and conveyed to the trustees upon the same trusts. The purchase-money for the additional land was raised partly by subscriptions and collections, partly by money borrowed at interest, and partly by sale of other portions of the property. On the property so acquired buildings of various kinds were erected by means of legacies, subscriptions, and collections. One of such buildings was let by the trustees, and yielded a considerable rent. In 1881, on the application of the trustees, a scheme was settled by the Charity Commissioners for the future regulation of the charity, directing that the property should be held upon the trusts of the Wesleyan chapel model deed, which were somewhat wider than those of the original deed of 1811, and provided for the application of surplus income towards the general objects of Wesleyans. The Commissioners sought to compel the trustees to render accounts of the income and expenditure of the trust property. The trustees claimed exemption from the jurisdiction of the Commissioners under sect. 62 of the Charitable Trusts Act, 1853:—*Held,* (1.) that the exemption in the section of "any building registered as a place of meeting for religious worship" only extended to the chapel itself, and not to the other buildings and property held therewith; (2.) that notwithstanding the extent of the objects for which the surplus income and the proceeds of sale were applicable, the property, other than the chapel, was (in substance) held on "a particular and specific trust," and constituted, according to the decision in *Corporation of the Sons of the Clergy* v. *Sutton* (27 Beav. 651), an "endowment" within the meaning of the section; and (3.) that the property did not fall within

CHARITY—*continued.*

either of the other exemptions in the section:—*Held,* therefore, that the trustees must render accounts of all the trust property except the chapel itself. *In re* ST. JOHN STREET WESLEYAN METHODIST CHAPEL, CHESTER - - 618

CHARITY COMMISSIONERS—Jurisdiction of—Building registered as place of worship *See* CHARITY. 3. [618

CHART—Copyright in—Pattern sleeve 377 *See* COPYRIGHT.

COMPANY—*Alteration of Memorandum of Association—Sanction of Court—Meaning of "Court"—Jurisdiction—Companies (Memorandum of Association) Act,* 1890 (53 & 54 *Vict. c.* 62), *s.* 1—*Companies (Winding-up) Act,* 1890 (53 & 54 *Vict. c.* 63), *ss.* 1, 2, 32 *sub-s.* 2, 33—*Order of March* 26, 1892.] Vaughan Williams, J., as the Judge of the High Court to whom winding-up jurisdiction is assigned by the Order of the 26th of March, 1892, has jurisdiction to confirm alterations in memoranda of association under the Companies (Memorandum of Association) Act, 1890. *In re* MINING SHARES INVESTMENT COMPANY - - - - 660

2. —— *Capital, Reduction of—Confirmation by the Court—Meaning of "Court"—Companies Act,* 1867 (30 & 31 *Vict. c.* 131), *ss.* 9, 11, 12—*Companies (Winding-up) Act,* 1890 (53 & 54 *Vict. c.* 63), *ss.* 1, 2, 32 *sub-s.* 2, 33—*Order of March* 26, 1892.] Vaughan Williams, J., as the Judge of the High Court of Justice to whom winding-up jurisdiction is assigned by the Order of the 26th of March, 1892, has jurisdiction to confirm a reduction of the capital of a company where the amount of such capital, paid up or credited as paid up, exceeds £10,000. *In re* OCEAN QUEEN STEAMSHIP COMPANY - 666

3. —— *Debenture-holders—Majorities—Administration of Debenture Trusts—Failure of Trusts.*] A foreign railway company issued bonds charged on their railway. Owing to litigation and consequent delay in realizing the bonds, it became impossible with the present or prospective resources of the company to carry out the undertaking. At the suit of a minority of bondholders, the Court administered the unspent part of the proceeds of such bonds in the hands of English trustees, on the footing that such funds ought to be applied, in the first place, in saving and realizing the property charged, and then be distributed pro ratâ among the bondholders; and that interest on and amortization of the bonds should cease from the date of the judgment. COLLINGHAM *v.* SLOPER. FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY *v.* SLOPER. FOREIGN, AMERICAN, AND GENERAL INVESTMENTS TRUST COMPANY *v.* SLOPER 96

4. —— *Directors—Present from Promoter to Director—Nominal Vendor with no Interest.*] P. and Q. were working a quarry in partnership. P. also owned an adjoining quarry, and had the option of taking a lease of S. Quarry. Wishing to form a company for working the quarries they called in A. and B. to assist them. A lease of the S. Quarry was granted to P., Q., A., and B., and on the same day the four entered into an agreement with a trustee for the intended

COMPANY—*continued.*

company to sell to the company the three quarries for a sum to be paid partly in cash and partly in paid-up shares, A. and B. to receive 120 shares each. The company was formed. B. was one of the first directors; the agreement was confirmed, and A. and B. received their shares. The company was ordered to be wound up, and it turned out that A. and B. had no interest in the property sold to the company except their interest as lessees of S. Quarry under the lease of even date with the agreement, and B. admitted that he had no interest in the S. Quarry till that day, and had nothing to do with fixing the price. The articles provided that the agreement for sale should not be impeached on the ground of the directors, or any of them, being vendors or being promoters of the company, nor should they be accountable for benefits secured to them. Kekewich, J., held that B. was liable to contribute to the assets of the company a sum equal to the nominal amount of the shares issued to him and to A. on the ground of his misfeasance as director in accepting the shares allotted to himself and in allowing A.'s shares to be issued to him:—*Held*, affirming this decision, that although if A. and B. had been bonâ fide owners of shares in the S. Quarry and had agreed to sell their interests for shares in the company, the transaction could not have been impeached, the insertion of their names as vendors when they had no real interest in the property sold was a device for enabling them to get fully paid-up shares for their services in the promotion of the company, and that the issuing them was a misfeasance on the part of the directors, and that as it was not known to the company that A. and B. were not really vendors, the clause in the articles did not protect B. *In re* WESTMORELAND GREEN AND BLUE SLATE COMPANY. BLAND'S CASE - - - - - - C. A. 612

5. —— *Stock—Transfer in Blank—Legal Title—Presumption of Redelivery—Registration—Breach of Trust—Notice—Companies Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 16), *ss.* 14, 15.] The sole executor and residuary legatee of the surviving trustee of a marriage settlement was the registered holder of a sum of stock of a company regulated by the Companies Clauses Consolidation Act, 1845, which was part of the trust fund. He deposited with a bank as security for an advance the stock certificate, a loan note undertaking to execute a proper assignment when required, and a blank transfer executed by himself. This transfer was not stamped and was expressed to be in consideration of 5*s*. The bank, who had no notice of the trust, subsequently inserted their own name in the blank transfer and executed it; but the deed was not redelivered by the borrower, nor executed in his presence, nor by his authority under seal. The transfer was duly registered by the company, of which the bank informed the borrower:—*Held* (affirming the decision of Wright, J.), that the transfer was not the deed of the borrower and did not pass the legal title to the stock; and, therefore, although the bank were not affected with notice of the breach of trust, their title must be postponed to the prior equitable title of the persons

COMPANY—*continued.*

interested under the trust.—*Semble*, the fact that the blank transfer was not stamped and did not state the true consideration would not in itself have invalidated the deed, the provisions on that subject in the Act being merely directory. POWELL *v.* LONDON AND PROVINCIAL BANK [C. A. 555

6. —— *Unlimited Liability—Memorandum and Articles of Association—Power to allow Members to withdraw from Liability—Right to withdraw in Absence of Express Power.*] There is nothing in the Companies Acts to prevent an unlimited company being associated on the terms that its members may withdraw from membership in the mode pointed out by its memorandum and articles of association, so as to be free from liability in the event of a winding-up.—*Semble*, that such a company may validly provide by its memorandum and articles for a return of capital to its members. *Trevor* v. *Whitworth* (12 App. Cas. 409) distinguished.—*Quære*, whether, in the absence of express power in its memorandum or articles of association, an unlimited company can allow its members to withdraw from liability as such. *In re* BOROUGH COMMERCIAL AND BUILDING SOCIETY - - - - - - 242

7. —— *Winding-up—Petition—Substratum gone—"Just and Equitable"—Subsequent Voluntary Winding-up—Preponderating Influence—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 79 *sub-s.* 5, 91, 129.] On the petition of shareholders for a compulsory winding-up order, on the ground that the substratum of the company is gone, the Court disregards a special resolution for voluntary liquidation which owes its existence to the preponderating influence of those whose conduct appears to require such investigation as can only be obtained in a winding-up by the Court. *In re* THE VARIETIES, LIMITED - 235

8. —— *Winding-up—Practice—Discovery—Inspection of Documents—Examination of Witnesses under Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 115—*Right to Inspection of Depositions.*] The Plaintiffs, a company in liquidation, brought an action against the Defendants to obtain rescission of a contract for the purchase of real property. In the course of the liquidation and after the commencement of the action certain persons were examined under sect. 115 of the Companies Act, 1862, and their depositions were duly taken. A commission subsequently issued in the action for the examination of witnesses abroad, and one of the persons who had been examined under sect. 115 was examined under the commission on behalf of the Defendants. During his cross-examination on behalf of the Plaintiffs he was asked as to the truth of certain of his answers given in the examination under sect. 115, and the answers were read to him from the depositions. He said that the statements contained in them were correct. He was also cross-examined as to certain answers given by other persons who had been examined under sect. 115, and those answers were read to him. The Defendants having taken out a summons for leave to inspect and take copies of those depositions which had been used by the Plaintiffs in the cross-examination:—*Held* (affirming the de-

COMPANY—*continued.*
cision of Kekewich, J.), that the Defendants were not entitled to the inspection. NORTH AUSTRALIAN TERRITORY COMPANY *v.* GOLDSBOROUGH, MORT AND COMPANY - - - C. A. 381

9. —— *Winding-up—Shares, Calls on—Debentures, Equitable Assignment of—Set-off—Notice—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 75.] In March, 1890, T., who held shares and debentures in a company, deposited debentures with the Plaintiffs, who were bankers, to secure a debt. The debentures were not on the face of them payable until the 31st of December, 1890; but by the indorsed conditions, in the event of the winding-up of the company, the principal moneys secured by the debentures became immediately due and payable. On the 3rd of November, 1890, a call was made upon T.'s ordinary shares payable on the 20th of November. By the articles of the company this call was deemed to have been made at the time when the resolution to make it was passed. On the 6th of November, 1890, the Plaintiffs gave the company notice of T.'s assignment, and such notice was entered by the company on the register of debentures. On the 12th of November the Plaintiffs commenced a debenture-holders' action against the company, and on the 19th of November the company went into voluntary liquidation. In the winding-up further calls were made upon T.'s shares. Upon a summons taken out by the Plaintiffs in the action and in the winding-up the company claimed the right to set off the calls due from T. as against the sum due upon the debentures: —*Held*, that in respect of the call made before the winding-up the company were entitled to set-off; but in respect of the calls made in the winding-up they were not so entitled. CHRISTIE *v.* TAUNTON, DELMARD, LANE AND COMPANY. *In re* TAUNTON, DELMARD, LANE AND COMPANY - 175

"CONTANGO" TRANSACTIONS—Deposit of securities - - - - - 120
See BANKER.

CONTRACT—Illegality—Missing-word competition - - - - - - 154
See GAMING.

CONTRARY INTENTION—Locke King's Act—Exoneration - - - 206
See WILL.

CONTRIBUTION—Co-surety—Debt provable in bankruptcy - - - - 514
See PRINCIPAL AND SURETY.

—— Tenants in common—Improvements - 461
See TENANT IN COMMON.

CONVERSION—Partnership property - 340
See PARTNERSHIP.

—— Trust for enjoyment in specie - 361
See SETTLEMENT. 1.

COPYHOLD—Quit rent—Statute of Limitations
See LIMITATIONS, STATUTE OF. 2. [497

COPYRIGHT—*Books—"Map, Chart, or Plan"—Pattern Sleeve—Subject-matter—Literary Merit—Copyright Act* (5 & 6 *Vict. c.* 45), *ss.* 1, 2.] The Plaintiff claimed copyright in a cardboard pattern sleeve containing a scale for adapting it to sleeves of any dimensions:—*Held*, that it was capable of

COPYRIGHT—*continued.*
copyright under 5 & 6 Vict. c. 45, as a chart or plan. HOLLINRAKE *v.* TRUSWELL - - 377

CORPUS—Charge on - - - 323
See ANNUITY.

COSTS—Partition action - - - 221
See PARTITION ACTION.

—— Taxation of bill of costs - - 284
See SOLICITOR.

CO-SURETY—Contribution - - - 514
See PRINCIPAL AND SURETY.

COURT—Sanction of—Alteration of memorandum of association - - - 660
See COMPANY. 1.

—— Sanction of—Reduction of capital - 666
See COMPANY. 2.

COVENANT—Breach of—Lease—Intention 271
See LANDLORD AND TENANT. 1.

—— Joint and several—Collateral security—Necessity for demand - - 300
See LIMITATIONS, STATUTE OF. 4.

DAMAGES—Undertaking as to—Interim injunction—Patent action - - 656
See PATENT.

DEBENTURE—Equitable assignment—Set-off against claims - - - 175
See COMPANY. 9.

—— Failure of undertaking—Administration of trusts by the Court - - 96
See COMPANY. 3.

DEBTORS ACT—Arrest under—Defaulting trustee - - - - - 1
See BANKRUPTCY.

DEED—Execution in blank—Legal title—Presumption of redelivery - - 555
See COMPANY. 5.

DEPOSIT—Parliamentary—Abandonment of undertaking - - - 638
See TRAMWAY COMPANY.

DIRECTOR—Misfeasance—Present from promoter - - - - - 612
See COMPANY. 4.

DISCOVERY—Production of documents—Examination in winding-up - - 381
See COMPANY. 8.

DISTRICT BOARD—Water supply - 603
See LOCAL GOVERNMENT. 2.

DIVORCE—Effect on property held in common—Joint tenancy - - - 229
See HUSBAND AND WIFE. 2.

EASEMENT—General words - - 315
See VENDOR AND PURCHASER.

—— Light - - - - - - 146
See LIGHT.

ELECTRICITY—Damage by—Nuisance - 186
See NUISANCE. 1.

ENJOYMENT IN SPECIE—Conversion - 361
See SETTLEMENT. 1.

EXONERATION — Real estate — Locke King's Act - - - - - - 206
See WILL.

FORECLOSURE—Form of judgment - 151
See MORTGAGE. 1.

FOREIGN BILL OF EXCHANGE — Protest — Notarial charges - - - 438
See BILL OF EXCHANGE.

FORFEITURE—Lease - - - 271
See LANDLORD AND TENANT. 1.

FRAUD—Concealed—Statute of Limitations 545
See LIMITATIONS, STATUTE OF. 1.

FRAUDS, STATUTE OF—Surrender of lease 75
See LANDLORD AND TENANT. 2.

GAMING — *Lottery — Wager — "Missing-word" Competition—Illegal Contract—Right of Competitors to return of their Contributions—Lottery Act*, 1802 (42 *Geo.* 3, *c.* 119), *s.* 1.] The Defendant, who was the proprietor of a newspaper, carried on in connection therewith a competition under the following conditions. He published in his paper a paragraph omitting the last word. In the same paper he printed a coupon with a direction that persons wishing to enter the competition must cut out the coupon, fill in the word missing from the paragraph, together with their names and addresses, and send it, with a postal order for 1s., to the office of the paper. It was further stated in the paper that the missing word was in the hands of a chartered accountant, enclosed in a sealed envelope; that his statement with regard to it would appear, with the result of the competition, in a subsequent issue of the paper; and that the whole of the money received in entrance fees would be divided equally amongst those competitors who filled in the missing word correctly. In an action by the successful competitors against the Defendant and the unsuccessful competitors, seeking administration of the trusts of the moneys in the hands of the Defendant for the purpose of the competition, and distribution among the persons entitled thereto:—*Held*, (1.) that the competition constituted a lottery within the meaning of 42 Geo. 3, c. 119, and was illegal; (2.) that so far as the money in the hands of the Defendant was impressed with any trust, it was one which had arisen out of an illegal transaction, and the Court would not render any assistance in its administration; and, *semble*, (3.) that notwithstanding the illegality of the competition the competitors had a legal right, enforceable by action at law, to the return of their contributions, at all events, provided that they gave notice of their claim before the money had been distributed by the Defendant. BARCLAY *v.* PEARSON - - - - - - 154

GENERAL ORDER, March 26, 1892 660, 666
See COMPANY. 1, 2.

GENERAL WORDS—Easement - - 315
See VENDOR AND PURCHASER.

HEIRLOOMS—Sale of—Settled Land Acts 479
See SETTLED LAND ACTS. 1.

HIGHWAY—Obstruction—Nuisance - 447
See NUISANCE. 2.

HOSPITAL—Local authority—Right to build out of their district - - - 19
See LOCAL GOVERNMENT. 1.

HUSBAND AND WIFE—*Separate Estate—Settlement by an Infant—Subsequent Repudiation — Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 2, 19.] An infant, being entitled on her marriage to a sum of £1000, by her settlement, in April, 1890, joined with her intended husband in assigning the same to trustees, to be held by them upon the usual trusts for the benefit of herself, her husband, and children. In October, 1891, the lady attained twenty-one, when she disaffirmed the settlement, and then claimed to be absolutely entitled to this sum of £1000:—*Held*, that the reasons given in *Hancock* v. *Hancock* (38 Ch. D. 78) as to the effect of sect. 19 of the Married Women's Property Act, 1882, on the operation of sect. 5 of that Act, were equally applicable to modify the operation of sect. 2, and that, consequently, the sum of £1000 was effectually included in the settlement by the husband's assignment, and could not be dealt with by the wife, notwithstanding her repudiation of the settlement when she attained twenty-one. STEVENS *v.* TREVOR-GARRICK - - 307

2. —— *Tenancy by Entireties—Effect of Dissolution of Marriage—Joint Tenancy—Separation —Right to Account—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 5—4 & 5 *Anne*, *c.* 3, *s.* 27.] Where husband and wife are tenants by entireties, a decree absolute for dissolution of marriage makes them joint tenants, and the former wife is entitled to an account of rents and profits as from the date of the decree. —Where real estate has been conveyed, since the coming into operation of the Married Women's Property Act, 1882, to a husband and wife jointly (even if they were married before the Act), they take as joint tenants, the wife's interest belonging to her for her separate use; and she is entitled to an account of rents and profits as from the date when she and her husband ceased to live together. THORNLEY *v.* THORNLEY [229

INFANT — *Marriage Settlement — Repudiation after attaining Full Age—Reasonable Time.*] A female infant, upon her marriage in 1857 at the age of eighteen, executed, without the sanction of the Court, a settlement of her reversionary interest (subject to a prior tenancy for life) in a share of real estate. The trusts of the settlement were, to pay the income to the wife, during the joint lives of herself and her husband, for her separate use without power of anticipation, and, upon the death of either, to the survivor for his or her life, and upon the death of the survivor upon trust for the children of the marriage as the husband and wife should jointly appoint, and, in default, as the survivor should appoint, and in default of any appointment upon trust for the children at twenty-one or marriage.—The husband in 1865 deserted the wife, and in 1889 she obtained a protection order. She had not heard of him since. The tenant for life died in

INFANT—*continued.*

December, 1890. Since then some income of the settled property had been paid to the wife, but she was entitled to receive that income whether she was bound by the settlement or not. She had done nothing else to confirm the settlement. There were two children of the marriage; but no appointment had been made under the power in the settlement.—In an action for the partition of the real estate:—*Held*, that the wife was still entitled to repudiate the settlement. *In re* JONES. FARRINGTON *v.* FORRESTER - - - 461

—— Settlement by — Repudiation — Married Women's Property Act - - 307
See HUSBAND AND WIFE. 1.

INJUNCTION — Interim — Recovery of land—Joinder of claims - - - 171
See PRACTICE. 2.

—— Interim—Undertaking as to damages—Patent action - - - 656
See PATENT.

INSPECTION OF DOCUMENTS—Examination in winding-up - - - - 381
See COMPANY. 8.

INTERESSE TERMINI — Power to maintain action on covenant - - - 75
See LANDLORD AND TENANT. 2.

INTEREST—Mortgage—Payment by tenant for life—Statute of Limitations - 429
See LIMITATIONS, STATUTE OF. 3.

INTERPLEADER—Appeal - - - 280
See PRACTICE. 1.

JOINDER OF CAUSES OF ACTION—Recovery of land—Interlocutory injunction - 171
See PRACTICE. 2.

JOINT TENANT—Husband and wife—Dissolution of marriage - - - 229
See HUSBAND AND WIFE. 2.

JURISDICTION—Court—Sanction to alteration of memorandum of association - 660
See COMPANY. 1.

—— Court—Sanction to reduction of capital 666
See COMPANY. 2.

LANDLORD AND TENANT—*Lease—Forfeiture—Breach of Covenant—Notice—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-ss.* 1, 2.] A notice under sect. 14, sub-sect. 1, of the Conveyancing and Law of Property Act, 1881, requiring the lessee to remedy a breach of covenant, may be good, though it does not require payment of compensation in money.—*North London Land Company* v. *Jacques* (32 W. R. 283) disapproved.—An application by a lessee under sect. 14, sub-sect. 2, of the same Act must be made in an action commenced by writ, and cannot be made by originating summons.—The decision of North, J., affirmed. LOCK *v.* PEARCE - - - - - C. A. 271

2 —— *Lease—Surrender by Act and Operation of Law—Oral Assent of Lessee—Change of Possession—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 3—*Real Property Act*, 1845 (8 & 9 *Vict. c.* 106), *s.* 3—*Interesse termini—Covenant for Quiet Enjoyment—Trespass—Damages.*] The grant of a new lease in possession, with the oral assent merely of a person in possession under a prior subsisting lease, does not operate as a surrender in law of the prior lease; such grant and mere oral assent not being sufficient to take the case out of the operation of the Statute of Frauds, sect. 3. There is no surrender by operation of law, unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents.—*Davison* v. *Gent* (1 H. & N. 744) followed; *Thomas* v. *Cook* (2 B. & Al. 119) and *Lyon* v. *Reed* (13 M. & W. 285) reconciled on this point. — Dictum of Stirling, J., in *Baring* v. *Abingdon* ([1892] 2 Ch. 374, 381), as to effect of the decision in *Davison* v. *Gent*, explained and corrected.—A person having only an interesse termini cannot maintain an action on a covenant for quiet enjoyment; neither can he maintain an action for trespass, nor for damages.—*Gillard* v. *Cheshire Lines Committee* (32 W. R. 943) distinguished. WALLIS *v.* HANDS [75

LEASE—Forfeiture - - - - 271
See LANDLORD AND TENANT. 1.

—— Surrender by operation of law - 75
See LANDLORD AND TENANT. 2.

LIGHT—*Easement—Prescription — Lease — Prescription Act*, 1832 (2 & 3 *Will.* 4, *c.* 71). *s.* 3.] Two tenements were held under leases from the same landlord. The lessee of the first enjoyed access of light to his windows over the second tenement for more than twenty years prior to the expiration of his lease. He continued to hold under an agreement for a lease for a term still running. The lease of the second tenement was subsequently surrendered; the landlord granted a lease to a new tenant:—*Held*, that the tenant of the first tenement had a right to access of light over the second tenement. ROBSON *v.* EDWARDS - - - - - 146

LIMITATIONS, STATUTE OF—*Concealed Fraud—Time when Right of Action accrues—Striking out Pleadings—Frivolous Action*—3 & 4 *Will.* 4, *c.* 27, *s.* 26.] The Plaintiff brought an action of ejectment in 1892, and alleged by his statement of claim that he was the heir-at-law of W. J., who died intestate in 1798, and that on his death his real estate was wrongfully taken possession of by the mother of G. C., an infant, in his name under the false pretence that G. C. was the heir-at-law of W. J.; that G. C. died an infant in 1805, and that his mother continued to hold possession of the estate in the name of R. C., an infant, whom she falsely asserted to be the brother of G. C., but who was really a supposititious child; that R. C. held possession of the estates after he came of age, and that he and his successors in title, including the Defendant, fraudulently concealed these facts from the true heir of W. J.; that the Plaintiff and his predecessors in title had been deprived of the estates by such concealed fraud, and that the same could not with reasonable diligence be discovered before 1879, when they became partially known; that the Plaintiff was an infant at that time, and did not attain his majority till 1887. The Defendant moved to have the state-

LIMITATIONS, STATUTE OF—*continued.*

ment of claim struck out as frivolous and vexatious, and filed an affidavit showing that the story of R. C. being a supposititious child was publicly spoken of in newspapers and otherwise as early as 1853, and had been made the ground of previous unsuccessful actions by other claimants against the Defendant and his predecessors:—*Held* (affirming the decision of Kekewich, J.), that the allegations in the statement of claim as to the entry in 1798 on behalf of G. C. did not shew a case of concealed fraud within sect. 26 of the 3 & 4 Will. 4, c. 37, but only a wrongful entry under a false claim; that the statute began to run against the Plaintiff's predecessors in title in 1798, and that as the possession had been adverse to the Plaintiff and his predecessors ever since, the operation of the statute had not been suspended by the alleged fraud in 1805; and that the Plaintiff or his predecessors might with reasonable diligence have discovered the concealed fraud, if any, more than twelve years before the commencement of the action. On these grounds the statement of claim was struck out, and the action was dismissed as frivolous and vexatious. —*Lawrance* v. *Lord Norreys* (15 App. Cas. 210) followed. *Trustees, Executors, and Agency Company* v. *Short* (13 App. Cas. 793) distinguished. Willis *v.* Earl Howe - - C. A. 545

2. —— *Copyhold Quit Rent—Non-payment—Extinction—3 & 4 Will. 4, c. 27, ss. 1, 2, 3—Real Property Limitation Act,* 1874 (37 & 38 *Vict. c.* 57), *s.* 1.] A quit rent payable in respect of a copyhold tenement is not, like a rent reserved upon a lease, excepted from the operation of the Statutes of Limitations (3 & 4 Will 4, c. 27, and 37 & 38 Vict. c. 57).—Where, therefore, such a quit rent had remained unpaid for more than twelve years, and no acknowledgment had been given in respect thereof, the right to recover the same was held to be barred by the operation of those statutes. Howitt *v.* Earl of Harrington [497

3. —— *Mortgage—Covenant for Payment—Settlement by Mortgagor of Equity of Redemption —Tenant for Life of Equity of Redemption—Payment of Interest by—3 & 4 Will. 4, c. 42, s. 5 —Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.] The payment of interest by the tenant for life of an equity of redemption, under a settlement made by the owner of the equity of redemption, is sufficient to keep the right of action on the covenant of such owner alive within the meaning of 3 & 4 Will. 4, c. 42, s. 5.—The principles laid down in *Forsyth* v. *Bristowe* (8 Ex. 716) and *Roddam* v. *Morley* (1 De G. & J. 1) followed.—Sub-sect. 6 of sect. 25 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), is retrospective. Dibb *v.* Walker - - - - - 429

4. —— *Mortgage—Joint and several Covenant by Mortgagee and Surety—Payment on Demand—Collateral Security—Necessity of Demand—3 & 4 Will. 4, c. 42, s. 3.*] Where there is a present debt and a covenant or promise to pay on demand, the demand is not considered a condition precedent to bringing the action; but where there is a covenant or promise to pay a collateral sum, on demand—*e.g.*, in a covenant by a surety for the principal debtor—then request must be made before action brought, or before the money can be considered as owing by the collateral debtor.—*Birks* v. *Trippet* (1 Wms. Saund. 32) discussed and applied.—A mortgage of September, 1867, contained a joint and several covenant by a father and his son to pay the mortgagee £3000 "on demand," and that they would, "in the meantime from the date hereof," pay interest on the same, at the rate therein mentioned. The father, who had joined as surety only, died in November, 1872, and his estate was being administered in an action commenced in April, 1880. No claim was made against the father's estate in respect of his liability on the covenant in the mortgage until July, 1889. The mortgagee now claimed to be let in as a creditor of the father's estate, in respect of the amount due on the mortgage, which the son was unable to pay:—*Held*, that the right of action did not accrue against the father's estate until July, 1889, when demand was first made, and consequently that the mortgagee was entitled to come in and prove his claim against the father's estate, without disturbing any dividends already distributed. *In re* J. Brown's Estate. Brown *v.* Brown - - - - - - 300

—— Co-surety—Unascertained liability to contribute - - - - 514

See Principal and Surety.

LOCAL GOVERNMENT—*Small-pox Hospital—Right of Local Authority to build Hospital beyond their District—Noxious Business—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 112, 131, 285.] A local urban authority proposed to erect a temporary small-pox hospital on land of their own within the district of an adjoining local authority without their consent. The adjoining local authority brought an action and moved for an injunction to restrain them from erecting the hospital:—*Held* (affirming the decision of Chitty, J.), (1.) that the small-pox hospital was not a noxious or offensive business within sect. 112 of the Public Health Act, 1875; (2.) that the local authority were empowered under sect. 131 to establish a hospital outside their own district without the consent of the local authority of the district in which they established it; (3.) that sect. 285, requiring the consent of the local authorities of adjoining districts, had no application to such a case. The injunction was therefore refused. Withington Local Board of Health *v.* Corporation of Manchester - C. A. 19

2. —— *Water Supply—Works outside District —Joint District Board—Consent of Authority of adjoining District—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 16, 32, 33, 34, 54, 285—"*Supply Water.*"] A local authority that has power, and is taking steps, to supply water, does "supply water" within the meaning of sect. 54 of the Public Health Act, 1875.—Where a local authority has the consent of the local authority of an adjoining district to make sewers, or lay down water-mains on land in such adjoining district, they can only do so subject to the provisions of sects. 32, 33, and 34 of the Public Health Act, 1875, applicable to such work.—The decision of North, J., affirmed. Jones *v.* Conway and Colwyn Bay Joint Water Supply Board [C. A. 603

LOTTERY—Missing-word competition - 154
See GAMING.

MEMORANDUM OF ASSOCIATION—Alteration of—Sanction of Court - - 660
See COMPANY. 1.

MISSING WORD—Competition—Wager - 154
See GAMING.

MORTGAGE—*Practice—Foreclosure—Form of Judgment—Money in hands of Receiver.*] Upon motion for judgment in a foreclosure action, the Court refused to insert in the judgment a direction similar to that which was inserted in the judgment in *Coleman* v. *Llewellin* (34 Ch. D. 143), there being no special circumstances in the case. CHESTON *v.* WELLS - - - - 151

2. —— *Redemption—Two Properties—Subsequent Incumbrances—Priority—Marshalling—Apportionment.*] P., in 1876, conveyed certain paper mills to H. by way of mortgage for securing £6000, and by deed of even date assigned a reversionary interest in personalty as collateral security for the same debt. In 1882 P. made a second mortgage of the paper mills and the reversion to the Plaintiff for £5000; and in 1884 P. made a third mortgage of the paper mills only to the Plaintiff for £2500. In 1885 a deed was executed whereby the Plaintiff transferred his mortgage for £2500 to H., and released the paper mills from his mortgage for £5000: so that H. became first and second mortgagee of the paper mills, as well as first mortgagee of the reversion, and the Plaintiff a second mortgagee of the reversion. P. made subsequent mortgages both of the paper mills and the reversion. The Plaintiff foreclosed the mortgages on the reversion which were subsequent to his own, and then brought an action claiming to redeem H.'s mortgage on the reversion on payment of £6000, and to have a transfer from him of his first mortgage on the paper mills, as a security for what he had paid:—*Held* (affirming the decision of Romer, J.), that the Plaintiff was entitled to redeem the reversion and paper mills on payment of the £6000 to H.; that the sum paid by him must be apportioned between the paper mills and the reversion, according to their respective values; and that the Plaintiff was entitled to have a conveyance of the reversion absolutely, and of the paper mills to be held as security for such part of the money paid as should be apportioned to that property:—*Held*, also, that upon the true construction of the deed of 1885, the release by the Plaintiff of his charge on the paper mills did not affect his right to a transfer of H.'s first mortgage on that property in the events which had happened.—*Barnes* v. *Racster* (1 Y. & C. Ch. 401) followed. FLINT *v.* HOWARD [C. A. 54

—— Interest—Payment by tenant for life—Statute of Limitations - - 429
See LIMITATIONS, STATUTE OF. 3.

—— Sale of moiety of mortgaged estate without notice - - - - 461
See TENANT IN COMMON.

—— Settled Land Acts—Tenant for life—Paying off incumbrances - - 531
See SETTLED LAND ACTS. 4.

MORTGAGE—*continued.*

—— Statute of Limitations—Covenant to pay on demand - - - - 300
See LIMITATIONS, STATUTE OF. 4.

NEGOTIABLE SECURITIES—Bonds payable to bearer—Pledge by broker - 120
See BANKER.

NEW TRUSTEE—Appointment of—Death of trustee before testator - - 511
See TRUSTEE. 1.

NOISE—Nuisance from - - - 588
See NUISANCE. 4.

NOTARIAL CHARGES—Foreign bill of exchange
See BILL OF EXCHANGE. [438

NOTICE—Breach of covenant - - 271
See LANDLORD AND TENANT. 1.

—— Withdrawal of member—Building society
See BUILDING SOCIETY. [311

NUISANCE—*Electricity—Damage—Telephone Company—Statutory Powers—Tramway Company—Right of Action—Provisional Order.*] A man who creates on his land an electric current for his own purposes, and discharges it into the earth beyond his control, is on the principle of *Fletcher* v. *Rylands* (Law Rep. 1 Ex. 265; 3 H. L. 330) as responsible for damage caused by that current as he would have been if, instead, he had discharged a stream of water. Where the act is done in pursuance of a provisional order of the Board of Trade, it is protected to the same extent as other nuisances under statutory authority.—A tramway company, acting under a provisional order and using the best known system of electrical traction, caused electrical disturbance in the wires of a telephone company acting under license from the Postmaster-General:—*Held*, that the tramway company are protected from liability for nuisance. NATIONAL TELEPHONE COMPANY *v.* BAKER - - - - 186

2. —— *Obstruction to Highway—Theatre.*] The lessee of a theatre held liable for obstruction to access to adjacent premises, by reason of the assembling of a crowd previously to the opening the doors of the theatre.—The Court refused an injunction to the occupier of the adjacent premises, where such obstruction existed at time of action brought, but had since ceased by reason of the action of the police; but gave the Plaintiff costs.—The law of nuisance from obstruction of a highway discussed. BARBER *v.* PENLEY - 447

3. —— *Small-pox Hospital—Public Nuisance—Injunction—Balance of Convenience—Action quia timet—Nuisance at Common Law.*] Anyone seeking an injunction to restrain an alleged future nuisance, whether public or private, must show a strong case of probability that the apprehended mischief will in fact arise. Principles on which the Court proceeds in granting or refusing injunctions in quia timet actions, and the result of the authorities on this, and on nuisance at Common Law, stated and discussed.—The Defendants proposed to establish a small-pox hospital on land of their own in an adjoining district, within 240 yards of two public roads, within 90 yards of a much-used part of a cemetery, and within 256 yards of the nearest residence; the Plaintiffs

NUISANCE—*continued.*

contended that what the Defendants proposed to do amounted to a public nuisance, as being dangerous to the health of the neighbourhood, and applied for an injunction:—*Held*, that in the present state of science the Plaintiffs had failed to show that there was a probability that the apprehended danger would in fact ensue.—If in such a case the evidence shewed that the maintenance of a small-pox hospital was on the whole more beneficial to the health of the public at large than the leaving of the persons suffering from the disease scattered in their own homes, query whether some weight might not properly be allowed to this circumstance.—Observations of Lord Hardwicke in *Baines* v. *Baker* (Amb. 158) considered. ATTORNEY-GENERAL *v.* CORPORATION OF MANCHESTER - - - - 87

4. —— *Smell — Statutory Powers — Tramway Company — Stables — Noise — Abating Nuisance before Trial—Injunction — Damages.*] The Defendants were a tramway company, who were empowered by their Act to lay down and construct two lines of tramway according to deposited plans, together with the works and conveniences connected therewith. The Act gave no compulsory powers for taking lands, and made no special mention of building stables. The Defendants constructed the lines, and built some large blocks of stables near the Plaintiff's house for the horses employed in drawing the cars. The Plaintiff complained of the smell caused by the stables, and brought an action for an injunction to restrain the Defendants from using the stables so as to cause a nuisance:—*Held* (affirming the decision of Kekewich, J.), that although horses were necessary for the working of the tramways, the company were not justified by their statutory powers in using the stables so as to be a nuisance to their neighbours, and that it was no sufficient defence to say that they had taken all reasonable care to prevent it. RAPIER *v.* LONDON TRAMWAYS COMPANY - - - - C. A. 588

PACKING-CASE—Trade-mark—User - 388
See TRADE-MARK. 1.

PARTITION—Mortgaged estate — Purchase of moiety without notice - - 461
See TENANT IN COMMON.

PARTITION ACTION—*Practice—Real Estate—Proceeds of Sale — Incumbered Shares—Incumbrancers—Costs, Separate sets of.*] Real estate divisible under a settlement in three equal shares, of which two were incumbered and the third unincumbered, was sold in a partition action, and the proceeds were paid into Court:—*Held*, on further consideration, that only one set of costs in respect of each share should be allowed out of the funds in Court.—*Belcher* v. *Williams* (45 Ch. D. 510) not followed. CATTON *v.* BANKS [221

PARTNERSHIP—*Real Estate—Conversion.*] The principle regulating the devolution of land held for a partnership or other common object discussed.—An interest in land held by two persons for a common object held to devolve as real estate. *In re* WILSON. WILSON *v.* HOLLOWAY - 340

PATENT—*Practice—Threats of Legal Proceedings — Interim Injunction — Undertaking in Damages—Form of Order.*] The undertaking in damages usually inserted in an order granting an interim injunction should not be inserted in an interim order in a patent action restraining one of the parties from publishing threats of legal proceedings for infringement of his alleged patent. FENNER *v.* WILSON - - - - 656

PATTERN—Copyright—Lady's sleeve - 377
See COPYRIGHT.

PERPETUITY—Gift to charity - - 491
See CHARITY. 2.

"PERSON AGGRIEVED"—Registration of trade-mark - - - - - 388
See TRADE-MARK. 1.

PLEDGE—Broker pledging customer's securities [120
See BANKER.

POWER—Of sale—Consent of tenant for life—Bankruptcy - - - - 332
See SETTLEMENT. 2.

PRACTICE—*Appeal—Interpleader—Decision in a summary way—Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 17—*Rules of Supreme Court*, 1883, *Order* LVII., *rr.* 8, 9, 11.] Where in interpleader proceedings a Judge decides a question under Order LVII., rule 9, without directing an issue or stating a special case, his decision is a summary decision within the meaning of the Common Law Procedure Act, 1860, s. 17, and is not subject to appeal. *In re* TARN - - - - C. A. 280

2. —— *Joinder of Causes of Action—Recovery of Land—Joinder of Claim for Injunction—Rules of Supreme Court*, 1883, *Order* XVIII., *r.* 2; *Order* XXXVI., *r.* 58.] The writ in an action was indorsed (1.) to recover possession of a house; (2.) for arrears of rent and mesne profits; (3.) for an injunction to restrain the Defendants from doing upon the house any act which might be or become a nuisance to the Plaintiff contrary to the provisions of a lease granted by the Plaintiff to the Defendants; and (4.) damages. Before the statement of claim had been delivered, the Defendants moved to set aside the writ upon the ground that the Plaintiff had not, before issue thereof, obtained leave for the joinder of the cause of action for the injunction with the cause of action for the recovery of land:—*Held*, that though a perpetual injunction, if claimed by the statement of claim, when delivered, might possibly be inconsistent with the terms of rule 2 of Order XVIII., an interlocutory injunction, being only a substitute for damages between the issue of the writ and the trial, was not inconsistent with such rule; and *held*, also, that upon the face of the writ there was no infringement of the rule, and that the motion must be refused. READ *v.* WOTTON - - - - 171

3. —— *Order for Sale—Shares in Limited Company—Pending Action—Perishable Chattels—Preservation of Property—"Goods"—Rules of Supreme Court*, 1883, *Order* L., *r.* 2.] Shares in a limited company are "goods" within Rules of Supreme Court, 1883, Order L., r. 2, and may therefore be sold under that rule in a pendin

PRACTICE—*continued.*
action, if for "any just and sufficient reason" it may be desirable to have them sold at once. EVANS *v.* DAVIES - - - - 216
—— Arbitration Act - - - 486
See ARBITRATION.
—— Jurisdiction—Sanction of Court—Alteration of memorandum of association 660
See COMPANY. 1.
—— Jurisdiction—Sanction of Court—Reduction of capital of company - - 666
See COMPANY. 2.
—— Landlord and tenant—Application by tenant for relief against forfeiture—Originating summons - - - 271
See LANDLORD AND TENANT. 1.
—— Mortgage—Foreclosure - - 151
See MORTGAGE. 1.
—— Partition action - - - 221
See PARTITION ACTION.
—— Patent action—Injunction—Undertaking as to damages - - - - 656
See PATENT.
—— Winding-up—Inspection of documents 381
See COMPANY. 8.

PRESCRIPTION—Light - - - 146
See LIGHT.

PRINCIPAL AND SURETY—*Co-Surety—Contribution—Right to Contribution after Judgment and before Payment—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 37—"*Liability*"—*Debt provable in Bankruptcy — Unascertained Liability to Contribute — Limitations, Statute of.*] A surety against whom judgment has been obtained by the principal creditor for the full amount of the guarantee, but who has paid nothing in respect thereof, can maintain an action against a co-surety to compel him to contribute towards the common liability; and for this purpose the allowance of a claim by the principal creditor against the estate of a deceased surety is equivalent to a judgment; and where the principal creditor is a party to the action, the surety may obtain an order upon the co-surety to pay his proportion to the principal creditor. Where the principal creditor is not a party, he may obtain a prospective order directing the co-surety, upon payment by the surety of his own share, to indemnify him against further liability.—Under sect. 37 of the Bankruptcy Act, 1883, the liability of a bankrupt co-surety to contribution, though unascertained at the time of the bankruptcy proceedings, is a debt provable in the bankruptcy.—The Statute of Limitations does not begin to run against a surety suing a co-surety for contribution until the liability of the surety is ascertained, i.e., until the claim of the principal creditor has been established against him; although at the time of the action for contribution the statute may have run as between the principal creditor and the co-surety. WOLMERSHAUSEN *v.* GULLICK - - - - 514

PROTEST—Bill of exchange - - 438
See BILL OF EXCHANGE.

PURCHASE WITHOUT NOTICE — Mortgaged estate - - - - 461
See TENANT IN COMMON.

QUIT RENT—Copyhold—Statute of Limitations
See LIMITATIONS, STATUTE OF. 2. [497

RECTIFICATION—Trade-mark 262, 388, 567
See TRADE-MARK. 1, 2, 3.

REDEMPTION — Mortgage — Two properties — Marshalling - - - 54
See MORTGAGE. 2.

REDUCTION OF CAPITAL - 242, 666
See COMPANY. 2, 6.

REGISTRATION—Trade-mark 262, 388, 567
See TRADE-MARK. 1, 2, 3.

REMOTENESS—Gift to charity - - 491
See CHARITY. 2.

REPUDIATION—Settlement—Infant — Reasonable time - - - - 461
See INFANT.
—— Settlement—Infant—Married Women's Property Act - - - - 307
See HUSBAND AND WIFE. 1.

RESTRAINT ON ANTICIPATION—Release of—Jointure - - - - 345
See SETTLED LAND ACTS. 2.

RULES OF SUPREME COURT, Order XVIII., r. 2
See PRACTICE. 2. [171
—— **Order XXXVI., r. 58** - - - 171
See PRACTICE. 2.
—— **Order L., r. 2** - - - - 216
See PRACTICE. 3.
—— **Order LVII., rr. 8, 9, 11** - - 280
See PRACTICE. 1.
—— **Order LXIV., r. 8** - - - 486
See ARBITRATION.

SET-OFF—Company—Calls against debentures
See COMPANY. 9. [175

SETTLED LAND ACTS—*Sale of Heirlooms—Fetter on Power of Sale under Act*—45 & 46 *Vict. c.* 38, *ss*, 37, 51.] There is no jurisdiction ex post facto to sanction the sale of heirlooms. Where heirlooms had been sold to advantage without an order, the Court directed the trustees not to take steps to recover them.—Personal estate was bequeathed on trust to apply the income in keeping up a sea-wall and ornamental grounds on settled real estate and on trust to pay the balance of the income to the tenant for life of the real estate during lives in being and twenty-one years, with a proviso that, if the tenant for life should become disentitled to the possession or income of the real estate, the settled personal estate should sink into the residue:—*Held*, that this proviso was void under sect. 51 of the Settled Land Act, 1882, and that the tenant for life who had sold the real estate was still entitled to the income of the personal estate. *In re* AMES. AMES *v.* AMES - 479

2. —— *Series of Deeds creating a "Settlement"—Sale by Tenant for Life—"Charges having priority to the Settlement"—Jointure Rent-charges created by prior Instruments—Restraint on Anticipation—Right of Tenant for Life to convey discharged from Jointure—Settled Land Act,* 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 3, 20, 21, 22, 31, 44.] By indentures of settlement dated respectively in

SETTLED LAND ACTS—*continued.*

1796, 1826, 1863, and 1885, the A. family estates became limited in 1885 to the use of E., Marquis of A., for life, with remainder to uses, inter alia, to secure the payment of certain jointure rent-charges, and then to the use of the present Marquis of A. for life, with remainders over. The first jointure was created under powers contained in the indentures of 1796 and 1826; the last jointure by the indenture of 1863; while the existing life estate was created by the indenture of 1885. Upon a sale by the tenant for life under the powers of the Settled Land Act:—*Held*, that the whole series of deeds constituted a "settlement" within the meaning of sect. 20 of the Settled Land Act, 1882, and that consequently by virtue of that section the tenant for life had power to convey the estates freed and discharged from the jointure rent-charges; that the purchaser was not entitled to require the concurrence in the conveyance either of the jointresses or the trustees of the terms by which the jointures were secured; and that upon payment of the purchase-money to trustees for the purposes of the Settled Land Act of the settlement created by the series of instruments, the income of the investments of such purchase-money would be applicable first in payment of the jointure rent-charges, as the income of the estates, if not sold, would have been applicable.—One of the jointresses was, by a settlement executed on her second marriage, restrained from anticipating her jointure. The Court made an order releasing such restraint, for the purpose of enabling her to consent to the payment, out of the purchase-money, of certain mortgages upon the estate over which her jointure had priority. *In re* MARQUIS OF AILESBURY AND LORD IVEAGH - - - - - 345

3. —— *Tenant for Life—Equitable Tenant for Life—Possession—Title Deeds.*] The powers granted to, and the duties imposed on, an equitable tenant for life of land by the Settled Land Acts have raised a presumption in favour of his title to possession which did not before exist, and have made it incumbent on the Court to provide that, if the estate and the trustees can be adequately protected by reasonable safeguards, an equitable tenant for life shall be let into possession, and be enabled personally to exercise those powers, and discharge those duties, unless there be found some urgent reason to the contrary.—An equitable tenant for life of land, whose estate was determinable on bankruptcy or alienation, under a will which conferred large discretionary powers of management on the trustees, was held entitled, in the absence of special reason to the contrary, to be let into possession of the land, and to have the custody of the title deeds. *In re* WYTHES. WEST v. WYTHES - - 269

4. —— *Tenant for Life—Power of Mortgaging to pay off Incumbrances—Discretion—Interests of Parties entitled under Settlement—Settled Land Acts*, 1882 (45 & 46 *Vict. c.* 38), *s.* 53; 1890 (53 & 54 *Vict. c.* 69), *s.* 11.] By sect. 11 of the Settled Land Act, 1890 (which Act and the Settled Land Act, 1882, are to be read and construed together as one Act): "Where money is required for the purpose of discharging an incumbrance on the settled land or part thereof, the tenant for life may raise the money so required . . . . on mortgage of the settled land . . . ., and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly;" but "incumbrance" under that section does not include a life annuity. By sect. 53 of the Settled Land Act, 1882, "a tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."—The tenant for life of settled land, part of which was mortgaged and part was not, and the whole of which was charged with the payment of certain life annuities, proposed to raise a sum of money by mortgaging the settled land (including the part of it not then subject to any mortgage) in order to pay off the existing mortgages and certain pecuniary legacies given by the settlement. The proposed mortgage would, by virtue of sects. 20 and 21 of the Settled Land Act, 1882, take priority over the annuities and all other charges and estates created by the settlement. It was not proposed to pay off the annuitants out of the money to be raised, nor could they be so paid off; and, having regard to the estimated probable sum which would be produced by a sale of the land under the powers given by the Settled Land Acts, it appeared that such a sale would preserve, whilst the proposed mortgage would unjustly prejudice, their interests. It was assumed that the tenant for life in deciding to effect the proposed mortgage was acting honestly, and with the desire, bonâ fide, to preserve his family estates for those intended by the settlor to enjoy them:—*Held*, that sect. 11 of the Settled Land Act, 1890, gave the tenant for life power to mortgage the unmortgaged part of the settled land in order to pay off the incumbrances on the other part; but that, having regard to sect. 53 of the Settled Land Act, 1882, and to the circumstances, the Court had power to interfere, and ought to interfere, to restrain him from effecting the proposed mortgage. HAMPDEN *v.* EARL OF BUCKINGHAMSHIRE - - C. A. 531

SETTLEMENT—*Sale of Real Estate—Conversion, Immediate Trust for—Power to postpone Conversion, Absence of—Tenant for Life—Enjoyment in Specie—Interim Rents—Investment.*] Realty was settled upon trust to pay the rent to A. for life, and immediately after her death to sell and invest and to pay the dividends of the trust stock to B. for life, with limitations over of the corpus of the trust stock. A. died leaving B. surviving, who died about a year after A. The land was sold without undue delay after A.'s death, but not till after the death of B. The rents received between the death of A. and B. produced more than 4 per cent. on the amount realized on the sale:—*Held*, that notwithstanding the absence of any power to postpone the sale, or any direction as to the interim rents, the whole rents between the deaths of A. and B. belonged to B.'s personal estate. HOPE *v.* D'HÉDOUVILLE - - 361

2. —— *Vendor and Purchaser—Power of Sale by Trustees with Consent of Tenant for Life—Bankruptcy of Tenant for Life—Sale by Trustees*

SETTLEMENT—*continued.*

—*Concurrence of Trustee in Bankruptcy.*] A settlement of real estate contained a power of sale by the trustees, with the consent of the tenant for life. The tenant for life incumbered his life estate, and was adjudicated a bankrupt, and the trustees afterwards entered into a contract to sell the land:—*Held*, that the consent of the tenant for life to the sale could still and must be given; but that a good title could not be made without the concurrence also of the incumbrancers and of the trustee in the bankruptcy. *In re* BEDINGFELD AND HERRING'S CONTRACT - - - - - - - 332

—— Infant — Repudiation — Married Women's Property Act - - - 307
See HUSBAND AND WIFE. 1.

—— Infant—Repudiation—Reasonable Time 461
See INFANT.

—— Series of deeds—Settled Land Acts - 345
See SETTLED LAND ACTS. 2.

SHARES—Calls on—Set-off—Debentures - 175
See COMPANY. 9.

—— Sale of, by Court - - - 216
See PRACTICE. 3.

SMELL—Nuisance from - - - 588
See NUISANCE. 4.

SOLICITOR—*Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *s.* 8, *sub-ss.* 2, 4—*Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 41—*Costs—Agreement — Signature — Payment — Impeachment of Agreement for Unfairness.*] An agreement between solicitor and client is a good agreement under sect. 8 of the Solicitors' Remuneration Act, 1881, if signed by the person to be bound thereby, although it is not signed by the other party.—In order to impeach an agreement between solicitor and client as unfair and unreasonable under sect. 8, sub-sect. 4, of the Act, it is not necessary that an action should have been brought to set it aside, or a previous order for taxation obtained; but, on a summons for taxation, if the evidence shews that there has been such an agreement and that there are grounds for suspicion of unfairness, the Court will order the Taxing Master in taxing the bill of costs to consider whether the agreement was fair and reasonable.—The words "By agreed costs £80" in such an agreement held to be a sufficient description of all the costs incurred up to the date of the agreement.—*Per* North, J.:—The written name of a solicitor in the heading of an account made out by his clerk does not amount to the signature of the solicitor to an agreement contained in the account.—*In re Palmer* (45 Ch. D. 291) considered. *In re* FRAPE. *Ex parte* PERRETT - - - C. A. 284

—— Trustee—Power to charge for professional services - - - - 413
See TRUSTEE. 2.

STABLES—Nuisance—Statutory powers - 588
See NUISANCE. 4.

STATUTES.

29 Car. 2, c. 3, s. 3—*Statute of Frauds* - 75
See LANDLORD AND TENANT. 2.

4 & 5 Anne, c. 3, s. 27—*Joint Tenants* - 229
See HUSBAND AND WIFE. 2.

STATUTES—*continued.*

42 Geo. 3, c. 119, s. 1—*Lotteries* - - 154
See GAMING.

2 & 3 Will. 4, c. 71, s. 3—*Prescription* - 146
See LIGHT.

3 & 4 Will. 4, c. 27, ss. 1, 2, 3—*Limitations* 497
See LIMITATIONS, STATUTE OF. 2.

—— —— s. 26 - - - - 545
See LIMITATIONS, STATUTE OF. 1.

3 & 4 Will. 4, c. 42, s. 3—*Limitations* - 300
See LIMITATIONS, STATUTE OF. 4.

—— —— s. 5 - - - - 429
See LIMITATIONS, STATUTE OF. 3.

5 & 6 Vict. c. 45, ss. 1, 2—*Copyright* - 377
See COPYRIGHT.

6 & 7 Vict. c. 73, s. 41—*Solicitors* - 284
See SOLICITOR.

8 & 9 Vict. c. 16, ss. 14, 15—*Companies Clauses*
See COMPANY. 5. [555

8 & 9 Vict. c. 106, s. 3—*Real Property* - 75
See LANDLORD AND TENANT. 2.

16 & 17 Vict. c. 137, ss. 62, 66—*Charitable Trusts* - - - - 618
See CHARITY. 3.

17 & 18 Vict. c. 113—*Locke King's Act* - 206
See WILL.

23 & 24 Vict. c. 126, s. 17—*Common Law Procedure* - - - - 280
See PRACTICE. 1.

25 & 26 Vict. c. 89, s. 75—*Companies* - 175
See COMPANY. 9.

—— —— ss. 79, 91, 129 - - - 235
See COMPANY. 7.

—— —— s. 115 - - - - 381
See COMPANY. 8.

30 & 31 Vict. c. 131, ss. 9, 11, 12—*Companies*
See COMPANY. 2. [666

32 & 33 Vict. c. 62, s. 4—*Debtors Act* - 1
See BANKRUPTCY.

36 & 37 Vict. c. 66, s. 25, sub-s. 6—*Judicature Act* - - - - - 429
See LIMITATIONS, STATUTE OF. 3.

37 & 38 Vict. c. 57, s. 1—*Limitations* - 497
See LIMITATIONS, STATUTE OF. 2.

38 & 39 Vict. c. 55, ss, 16, 32, 33, 34, 54, 285—*Public Health* - - - 603
See LOCAL GOVERNMENT. 2.

—— —— ss. 112, 131, 285 - - 19
See LOCAL GOVERNMENT. 1.

41 & 42 Vict. c. 54—*Debtors Act* - - 1
See BANKRUPTCY.

44 & 45 Vict. c. 41, s. 6, sub-ss. 1, 2, 4—*Conveyancing Act* - - - 315
See VENDOR AND PURCHASER.

—— —— s. 14, sub-s. 1, 2 - - 271
See LANDLORD AND TENANT. 1.

—— —— s. 31, sub-ss. 1, 6—*Conveyancing and Law of Property* - - 511
See TRUSTEE. 1.

44 & 45 Vict. c. 44, s. 8, sub-ss. 2, 4—*Solicitors' Remuneration* - - - 284
See SOLICITOR.

STATUTES—*continued.*

45 & 46 Vict. c. 38, ss. 2, 3, 20, 21, 22, 31, 44—*Settled Land Act.* 2 - - 345
See SETTLED LAND ACTS. 2.

—— —— ss. 37, 51 - - - 479
See SETTLED LAND ACTS. 1.

—— —— s. 53 - - - - - 531
See SETTLED LAND ACTS. 4.

45 & 46 Vict. c. 61, s. 51, sub-ss. 2, 5; s. 57, sub-s. 1; ss. 65, 68, 97—*Bills of Exchange* - - - - 438
See BILL OF EXCHANGE.

45 & 46 Vict. c. 75, ss. 1, 5—*Married Women's Property* - - - - 229
See HUSBAND AND WIFE. 2.

—— —— ss. 2, 19 - - - 307
See HUSBAND AND WIFE. 1.

46 & 47 Vict. c. 52, s. 9—*Bankruptcy* - 1
See BANKRUPTCY.

—— —— s. 37 - - - - 514
See PRINCIPAL AND SURETY.

46 & 47 Vict. c. 57, ss. 64, 90—*Patents, Designs, and Trade Marks* - - 388, 567
See TRADE-MARK. 1, 3.

52 & 53 Vict. c. 49, s. 4—*Arbitration* - 486
See ARBITRATION.

53 & 54 Vict. c. 62, s. 1—*Companies (Memorandum of Association)* - - 660
See COMPANY. 1.

53 & 54 Vict. c. 63, ss. 1, 2, 32, sub-ss. 2, 33—*Companies (Winding-up)* - 660, 666
See COMPANY. 1, 2.

53 & 54 Vict. c. 69, s. 11—*Settled Land Act*
See SETTLED LAND ACTS. 4. [531

55 & 56 Vict. c. 27, s. 1—*Parliamentary Deposits* - - - - 638
See TRAMWAY COMPANY.

STATUTORY POWERS—Nuisance - 186, 588
See NUISANCE. 1, 4.

STOCK—Transfer in blank—Legal title - 555
See COMPANY. 5.

STRIKING OUT PLEADINGS—Frivolous action
See LIMITATIONS, STATUTE OF. 1. [545

SUMMONS—Originating—Application by lessee for relief against forfeiture - 271
See LANDLORD AND TENANT. 1.

SURETY - - - - - - 514
See PRINCIPAL AND SURETY.

SURRENDER—Lease—Operation of law - 75
See LANDLORD AND TENANT. 2.

SURVIVOR—Trustees—Dying before testator—Power to appoint new trustees - 511
See TRUSTEE. 1.

TAXATION—Bill of costs - - - 284
See SOLICITOR.

TELEPHONE COMPANY—Damage to, by electric disturbance - - - 186
See NUISANCE. 1.

TENANT FOR LIFE—Bankruptcy of—Power of sale - - - - - 332
See SETTLEMENT. 2.

TENANT FOR LIFE—*continued.*

—— Enjoyment in specie—Conversion - 361
See SETTLEMENT. 1.

—— Equitable—Possession of land—Custody of title-deeds - - - - 369
See SETTLED LAND ACTS. 3.

—— Payment of interest on mortgage—Statute of Limitations - - - 429
See LIMITATIONS, STATUTE OF. 3.

—— Settled Land Acts—Mortgage to pay off incumbrances - - - 531
See SETTLED LAND ACTS. 4.

TENANT IN COMMON—*Mortgage—Subsequent Conveyance for value of one Moiety—Covenant for further Assurance—Right to Indemnity against Mortgage—Partition—Expenditure of one Tenant in Common in Permanent Improvements—Contribution.*] The owner of an estate mortgaged it, and afterwards sold an undivided moiety of it. The conveyance to the purchaser did not mention the mortgage, but it contained a covenant by the vendor with the purchaser for further assurance. The two moieties afterwards devolved on different persons.—In a partition action:—*Held*, that, as between the owners of the two moieties, the unsold moiety must bear the mortgage debt.—The owner of one moiety of a property, who was also tenant for life of the whole, borrowed money on mortgage which was, with other moneys, expended in permanently improving the property. In an action after her death for the partition of the property:—*Held*, that the present value of the improvements (but not exceeding the sum originally borrowed on mortgage) must be borne rateably by the owners of both moieties.—*Teasdale* v. *Sanderson* (33 Beav. 534) explained. *In re* JONES. FARRINGTON *v.* FORRESTER - 461

THEATRE—Nuisance—Obstruction to highway
See NUISANCE. 2. [447

TIME—Enlargement of—Step in proceedings—Arbitration - - - - 486
See ARBITRATION.

TITLE-DEEDS—Possession of—Equitable tenant for life - - - - 369
See SETTLED LAND ACTS. 3.

TRADE-MARK—*Registration—Rectification—Old Trade-mark—User on Packing-case—Person aggrieved—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 90.] The words "Yorkshire Relish" were registered as a trade-mark for sauces by P., who claimed to have used them several years before 1875. He brought an action against the B. Company, which sold a sauce called "London Relish," to restrain them from using a label colourably resembling the label used by him for his "Yorkshire Relish," but not complaining of their violating his registered trade-mark. The B. Company moved to expunge P.'s registered trade-mark "Yorkshire Relish," complaining that it embarrassed them in their trade; and that the words had not been used before 1875 as a trade-mark.—The Applicants stated that although they did not now sell Yorkshire Relish, they might possibly do so if the words were removed from the register. With respect to the user of the trade-mark before 1875, P. produced evidence to shew that he had been

TRADE-MARK—*continued.*

in the habit before that date of packing his bottles of sauce in packing-cases on which the words "Yorkshire Relish" were stencilled without any other device; that those words were recognised by the trade and the public as denoting his sauce and no other, and that he had used them as a trade-mark. P. had other registered trade-marks containing the words "Yorkshire Relish," with the device of a willow-pattern plate:—*Held* (affirming the decision of Chitty, J.), first, that the B. Company were persons aggrieved within the meaning of the Patents, Designs, and Trade Marks Act, 1883, s. 90, although no proceedings had been actually instituted against them for violation of P.'s registered trade-mark; and, secondly, that the words "Yorkshire Relish" had not been used by P. as a trade-mark before 1875, and ought to be expunged from the register. *In re* POWELL'S TRADE-MARK - - C. A. 388

2. —— *Registration — Rectification — Similarity—Old Mark—Deceptive User—Misleading use of Words "Trade Mark"*] D., a British cigar manufacturer, applied to register as a new mark for manufactured tobacco a label containing the words "Star of Hope" and a marine picture with a small six-pointed star in the sky. The application was opposed by W. as the registered proprietor of two marks for the same class of goods. The first mark was registered as an old mark in 1877, and consisted of an eight-pointed star. This mark was chiefly used upon packet tobacco; but from 1870 to 1884 cigars were manufactured for W. by an English firm, upon which the mark was used as part of a label containing the name of an imaginary Spanish firm and the word "Habana." W.'s trade in cigars was comparatively small, and was subsidiary to his trade in packet tobacco. The second mark was registered in 1886 as a new mark, and consisted of a pictorial label, and by the side of the label an eight-pointed star, to which the words "trade mark" were attached. W.'s goods were frequently ordered by the public as "star" goods. D. moved to expunge W.'s marks:—*Held*, first, that W. had no exclusive right to the name or design of a star, that, apart from such claim, D.'s mark was not calculated to deceive, and that D. was entitled to registration:—*Held*, also, that W.'s first mark was distinctive, and was not invalidated by the mode of user; first because the misrepresentation accompanying the use of the mark upon cigars was not such as to destroy its distinctive character; secondly, because there had been no general or very extensive user of the mark upon cigars.—*In re Wood's Trade-mark* (32 Ch. D. 262) distinguished.—*Held*, also that W.'s second mark was misleading, by reason of the position of the words "trade mark," and ought to be expunged except as to the star, subject to an application being made by W. to amend. *In re* DEXTER'S APPLICATION. *In re* WILLS' TRADE-MARKS - - - 262

3. —— *Registration—Rectification—Passing off Goods as those of another Trader—User by other Persons of Distinctive Words in a Trade-mark at the time when the Mark is Registered—Injunction —Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 90.] In 1879 the Plaintiffs registered as a trade-mark for beer a figure of John Bull, with the words "John Bull Brand" round his head and shoulders, and in 1886 a mark consisting of the former with some additions. The Plaintiffs' trade was mainly an export trade. In 1879, L. & Co., a firm in Sheffield, were selling "John Bull Beer," but their trade was purely local, and the Plaintiffs did not know of it. In 1890 this firm finally abandoned the use of the words "John Bull."—In 1884 the Defendants, who brewed beer for the home market, registered at Stationers' Hall a trade-mark for beer very similar to that of the Plaintiffs, and containing the words "John Bull, registered." In 1885 they applied to register it as a trade-mark; but the Plaintiffs opposed, and the application was refused. The Defendants, however, continued to sell beer under the above mark. The Plaintiffs in 1891, as soon as they became aware of the use of this mark by the Defendants, commenced an action to restrain them from infringing the Plaintiffs' trade-marks, and from passing off their beer as that of the Plaintiffs by the use of any labels so like those of the Plaintiffs as to be calculated to deceive. It appeared that the Defendants did not know of the Plaintiffs' trade-marks when they first began to use their own. The Defendants moved to expunge the words "John Bull" from the Plaintiffs' trade-mark:—*Held*, by Kekewich, J., that the use of the words "John Bull" by the Sheffield firm at the time when the Plaintiffs' mark was registered would, if known to the Comptroller, have prevented the registration, and that the marks must be rectified by striking out "John Bull Brand"; that the Plaintiffs' trade-mark was not infringed, and that the action must be dismissed, as the Defendants were not using a mark calculated to pass off their goods as the goods of the Plaintiffs when the words "John Bull" were expunged from the Plaintiffs' mark:—*Held*, on appeal, that assuming that L. & Co. could in 1879 have successfully opposed the registration of the Plaintiffs' trade-mark, no one else had a right to oppose; and that as L. & Co. had not opposed, and had subsequently abandoned the use of the words "John Bull" before these proceedings, the Court ought not to interfere with the Plaintiffs' trade-mark, which was not, as in *Thompson* v. *Montgomery* (41 Ch. D. 35; [1891] A. C. 217) a mark of such a nature that it could not be registered as a trade-mark.—The principles on which the Court exercises the discretion conferred on it by the Patents, Designs, and Trade Marks Act, 1883, as to removing a mark from the register, considered:—*Held*, further, that the Defendants' label was an infringement of the Plaintiffs' right, and that the Plaintiffs were entitled to an injunction. PAINE & CO. *v.* DANIELLS AND SONS' BREWERIES. *In re* PAINE & CO.'S TRADE-MARKS - - C. A. 567

TRAMWAY COMPANY — *Railway Company — Paper Company — Abandoned Undertaking — Parliamentary Deposit, Application of—Solicitor —Parliamentary Agent—Creditors, Meritorious and Non-Meritorious—Parliamentary Deposits and Bonds Act*, 1892 (55 & 56 *Vict. c.* 27), *s.* 1.] Where the undertaking, authorized by Parlia-